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# In The Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT BRACE AND ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,
*Petitioners,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, pursuant to 33 U.S.C. § 1344(f)(1)(A), a farmer's conversion of pastureland into crop-bearing fields is "normal farming" activity exempt from the Section 404 permit requirements of the Clean Water Act.

2. Whether the Army Corps of Engineers' regulation providing that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States," 33 C.F.R. § 323.4(c), is an overbroad and unauthorized construction of the "recapture provision" of the Clean Water Act, 33 U.S.C. § 1344 (f)(2).

## RULE 29.1 STATEMENT AND PARTIES TO THE PROCEEDING

Petitioners Robert Brace and Robert Brace Farms, Inc. have no parent or non-wholly owned subsidiary corporations.

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### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 19a-41a) is reported at 41 F.3d 117 (3d Cir. 1994). The opinion of the district court (App., *infra*,1a-18a) is unreported.

### JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 22, 1994 and a timely petition for rehearing was denied on January 9, 1995. App.,

*infra*, 42a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions relevant to this case are set forth at App., *infra*, 43a-44a.

## STATEMENT

This appeal involves a judicial and regulatory override of federal legislation exempting normal agricultural activities from the permit requirements of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq*. Through misconstruction, disregard of relevant facts and inappropriate deference to unreasonable agency regulations, the court of appeals has further muddied federal wetlands jurisprudence to the detriment of the Nation's farmers — a community which Congress specifically intended to spare, under routine circumstances, from the burdens of a complex regulatory program.

### A. Factual Background

Petitioner Robert Brace ("Brace") farms approximately 600 acres of farm land in Erie County, Pennsylvania. Among Brace's land holdings is his family's 140 acre homestead farm that he purchased from his father in 1975. This land has been continuously farmed by the Brace family since the 1930s. This litigation concerns Brace's attempt to refurbish and improve agricultural drainage on the homestead farm so as to integrate that farm into his primary farming business operation, which is producing row crops. Brace's efforts have been frustrated by federal enforcement of wetlands regulations because approximately 30 acres of the homestead farm are considered to be "wetlands" and subject to regulation by the U.S. Army Corps of Engineers ("COE") as navigable waters of the United States.

Prior to 1977, Brace's father and brother used the homestead farm including the area now referred to as the Site for pasturing cows and horses. In 1976, Brace decided to improve the

farm by updating and expanding the existing drainage system, parts of which had fallen into disrepair. Following a plan prepared by the Agricultural Stabilization and Conservation Service, an agency of the United States Department of Agriculture, Brace began in 1977 to clean and improve the drainage system. As resources permitted, Brace reopened a drainage channel to allow the water to flow in its natural direction and replaced or installed drainage tile throughout the 140 acre farm.[1] In so doing, Brace did not introduce any new or foreign fill onto the Site. The only "discharge" in this case was Brace's "sidecasting" or redepositing of soil or sediment which had washed off his farmland into the drainage ditches.

The improvements to the drainage system were completed and the farm's integrated drainage system was operating in 1977.[2] As the district court noted, "The drainage system impacts the ability to produce crops on all parts of Brace's property; without such a system, the property is not suitable for farming [production of row crops] because of soil conditions."

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[1] The court of appeals erroneously stated that Brace installed four miles of plastic tubing within the Site. App., *infra*, 36a, 39a. In fact, the tubing was installed throughout the entire 140 acre homestead farm and within some neighboring farms.

[2] COE jurisdiction did not even extend to headwaters areas until, following the decision in *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), the Corps in 1977 promulgated its final rule defining the statutory term "navigable waters" to include wetlands. 42 Fed. Reg. 37122 (1977). By then Brace had already completed cleaning the drainage ditches and was augmenting the farm's existing drainage system. The legal confusion surrounding the COE's expansive definition of "navigable waters" was not finally dispelled until this Court's decision in *United States v. Riverside Bayview Homes, Inc*, 474 U.S. 131 (1985), by which time Brace had nearly completed improving the farm and would soon begin planting row crops.

App., *infra*, 5a. By late-1986, Brace had planted rye, oats and hay on portions of the thirty acre Site.

The United States Environmental Protection Agency ("EPA") and COE became aware of Brace's activities in May 1987. Following a brief investigation, EPA and COE issued administrative orders on July 15 and 23, 1987 and May 3, 1988, alleging violations of Section 404 of the CWA and ordering Brace to cease and desist all discharge activities on the homestead farm. The administrative orders further required Brace to plug with concrete all main drainage tiles servicing the entire homestead farm and restore the areas of the farm now declared to be federally regulated wetlands to their "natural state." Brace immediately ceased all activities in the area he understood to be at issue except for mowing hay.

**B. The Statutory Framework**

Section 301(a) of the CWA prohibits the discharge of any pollutant into navigable waters of the United States,[3] unless the discharge is authorized by a permit. 33 U.S.C. § 1311(a). Section 404 of the CWA authorizes the Secretary of the Army, through the COE, to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) and (d).

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[3] EPA and COE have defined the term "waters of the United States" to include "wetlands." 33 C.F.R. § 328.3(b); 40 C.F.R. § 232.2(r). Prior to trial in the district court, the parties to this case stipulated as follows: "At the time of the Defendants' alleged 'discharges,' the approximately thirty-acre site that is the subject of this lawsuit was "wetlands" as defined at 33 C.F.R. § 328.3(b), and 40 C.F.R. § 232.2(r)." For the purposes of asserting his claim of exemption, Brace was willing to concede that the Site exhibited the physical characteristics which brought it within the technical definition of "wetlands" then employed by federal wetlands regulators.

Specific exemptions to the permit requirements are contained in Section 404(f) of the CWA.

Under that section, a permit is not required to discharge dredged or fill material resulting from any of six categories of activities, including farming:

> (1) [T]he discharge of dredged or fill material--
>
> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices...
>
> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches...
>
> is not prohibited by or otherwise subject to regulation under this section...

33 U.S.C. § 1344(f)(1)(A).

The COE and EPA have promulgated regulations narrowly constricting the "normal farming" exemption. Under these regulations, in order to constitute "normal farming activity," the activity:

> must be part of an established (i.e., on-going) farming, silviculture and ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii).... Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

33 C.F.R. § 323.4(a)(1)(ii).

Section 404 also contains a "recapture provision," an exception to the enumerated activities for which no permit is required in order to discharge dredged or fill material into the navigable waters. Under Section 404(f)(2),

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2).

Thus, Section 404(f) establishes a two-part test for whether a party may discharge fill material without enduring the permit application process: the party may engage in unpermitted discharge of fill material (1) so long as its activity falls within one of the six exempt categories of activity, unless (2) the activity brings the wetlands area into "a use to which it was not previously subject" and impedes the flow of navigable waters.

**C. The District Court's Decision**

More than three years after federal regulators issued their administrated orders, on October 4, 1990, the United States filed suit against Brace in the United States District Court for the Western District of Pennsylvania to enforce the order, alleging violations of the permit requirement section of the CWA.[4] The district court exercised it's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345, 1355 and 33 U.S.C. § 1319 (b).

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[4] From the outset of the government's enforcement proceeding against him in 1987, Brace has asserted that his acitvities on the Brace homestead farm were exempt from federal regulation under Section 404 of the CWA. However, pre-enforcement review of CWA administrative orders is unavailable, *see South Pines Associates v. United States*, 912 F.2d 713, 717 (4th Cir. 1990); *Child v. United States*, 851 F. Supp. 1527 (D. Utah 1994); *Route 26 Land Dev. Ass'n v. United States*, 753 F. Supp. 532, 540 (D. Del. 1990), *aff'd without opinion*, 961 F.2d 1568 (3d Cir. 1992), and COE regulations preclude processing "after the fact" permit applications. *See* 33 C.F.R. 326.3(e) and App., *infra*, 8a. Moreover, EPA terminated a related administrative

Following a four day bench trial, the district court entered judgment in favor of Brace. The district court's decision was supported by, *inter alia*, the following findings of fact and conclusions of law:

- Since 1977 Defendants' activities on the site have consisted only of normal farming activities, maintenance of the existing drainage system, and activities to enhance and conserve the upland soil and water on the farm property. App., *infra*, 8a.
- [T]he subject site was during the entire period of time that ownership rested in the Brace family, an integral part of an established and on-going farm and ranching operations, and Defendants' activities during the time frame of 1985-87 did not bring a new area into the operation. App., *infra*, 9a.
- This case involves a thirty acre site that has been part of an ongoing farming operation of the Brace family for more than half a century. The land is not being converted to a use to which it was not previously subject[.] App., *infra*,16a.
- Under the exemption provisions of the CWA, the activities of Brace and Brace Farms do not require a permit because they constitute: (a) normal farming

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civil penalty action against Brace in which he claimed the agricultural exemption. App., *infra*, 7a. Therefore, Brace had no opportunity "formally" to claim the exemption until the United States initiated litigation in 1990 and the district court found his activities to be exempt in December 1993. A system that compels a farmer to wait almost ten years to have his day in court is, it is respectfully submitted, badly in need of adjustment. Ensnarling farmers in such a regulatory morass is surely not what Congress intended when enacting the normal farming activity exemption to the Section 404 permit requirements. *See* footenotes 6 and 7, *infra*.

activities; (b) upland soil and water conservation practices; and, (c) maintenance of drainage ditches. App., *infra*, 16a.

**D. The Court of Appeals' Decision**

The United States Court of Appeals for the Third Circuit reversed. In an opinion written by Judge Cowen, the court of appeals construed the statutory term "normal farming activities" so narrowly that, petitioners contend, it eviscerated the agricultural exemption. The court deprecated the historical and geographical context of Brace's activities, and discounted the normal practice of Erie County farmers, while overriding the contrary factual determination of the district court, in holding that Brace's activities did not constitute "normal agricultural activity." App., *infra*, 29a-38a.

The courl of appeals further determined for purposes of the CWA's "recapture" provision that Brace forfeited any agricultural exemption by virtue of his changing the use of his farm land from one type of farming (pasturing) to another type of farming (row cropping). That change, the court of appeals held, brought the Site into "a new, non-wetland use." App., *infra*, 39a. Relying exclusively upon a COE regulation providing that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States," 33 C.F.R. § 323.4(c), the court of appeals held that even if Brace was engaged in normal farming activity, his operation was by definition "recaptured" under Section 404(f)(2) of the CWA. *Id.*

## REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to review the clear error of the court of appeals and to interdict the unauthorized extension of federal jurisdiction through overbroad regulations promulgated by the COE. This combination of COE overreaching and judicial misconstruction unlawfully extends the reach of the CWA into normal agricultural activities specifically shielded by Congress from the burdensome requirements of Section 404 regulation and permitting.

The issues presented in this petition are of critical importance for two reasons. First, the court of appeals' decision has grave implications for the entire American agricultural community. It generates uncertainty by counterintuitively.communicating, in direct contradiction to the agricultural exemption provided in 33 U.S.C. § 1344(f)(1)(A), that farmers who engage in normal farming activity on continuously farmed wetlands now may be subject to wetlands regulation enforcement. The court of appeals decision also threatens thousands of farm families with the direct costs and burdensome requirements of environmental regulation that Congress deliberately refrained from imposing.

Second, the court of appeals erroneously decided an important question of federal law involving significant jurisprudential issues — such as the proper extent of wetlands regulation under Section 404 and the proper application of the *Chevron* doctrine to particular COE regulations — the contours of which remain imperfectly defined.

The proper scope and extent of wetlands regulation and enforcement have been in a state of chaos since federal regulatory jurisdiction was extended to headwaters areas. The farming community should not be subject to the regulatory morass in which Brace found himself. This Court's intervention is needed to restore reason and balance in federal wetlands regulation.

## I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS ERRONEOUS

### A. Brace's Activities On His Farm Meet The Criteria For The "Normal Farming Activities" Exemption From Section 404's Permit Requirement

Under regulations promulgated by the COE, in order to qualify for the "normal farming activities" exemption of 33 U.S.C. § 1344(f)(1)(A), Brace must prove that his activities were "part of an established (i.e. ongoing) farming ... operation," and that they are in accordance with definitional regulations listed in 33 C.F.R. § 323.4(a)(1)(iii). 33 C.F.R. § 323.4(a)(1)(ii). He did so. App., *infra*, 9A. Brace should have

been found to qualify for the exemption because his activities (1) constituted "normal farming" and (2) continued without interruption a long history of farm activity on the Brace homestead farm in general and on the Site in particular.

**1. Brace Continued An Ongoing Farming Operation**

In holding that Brace's activities were not normal farming activities, the court of appeals ignored a fifty year history of constant use of and improvements to the homestead farm. During that time, the farm has been continuously used for normal farming activities such as pastureland and the growing of corn, hay, cabbage, oats and dry feed.

The record contains abundant, uncontroverted evidence (including testimony from the former County Executive Director of the Agricultural Stabilization and Conservation Service) that in the Erie County region, because soil typically requires continuous drainage in order to be suitable for cultivation, the installation and maintenance of drainage systems is an ordinary and necessary activity associated with farming. The district court considered Brace's activities in light of the history of the homestead farm, and in the context of normal farming practices in Erie County.

Disregarding specific findings of fact, the court of appeals criticized the district court for its historical and contextual approach. App., *infra*, 31a-33a. Without regard to evidence of actual Erie County farming practices, the court simply echoed the government's brief by characterizing the district court's factual finding as resting upon "a casual observation." App., *infra*, 30a.[5]

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[5] Federal Rule of Civil Procedure 52 states in pertinent part that district court "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The district court's findings of fact were based upon a full hearing and consideration of the relevant evidence as well as a full and

By focusing solely on Brace's particular activity within the thirty acres targeted by the government as wetlands, the court of appeals ignored his other agricultural activities on, and purposeful integration of the Site with, the rest of the farm. This refusal to consider Brace's Site activities within the context of his larger farming operation, and Erie County farm practice generally, arbitrarily skewed the court's analysis of the normal farming activity exemption. The more natural and rational approach would consider the functional relationship of the Site to the total mix of farming activities that regularly occur on the entire farm, given the geographical and ecological realities of Erie county. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983)("Our [judgment] is based upon the same total activities approach used by the district court. That court did not make a tract-by-tract determination of what precise activities were observed in each area of the lands involved"); *United States v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166, 1175 (D. Mass 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988)("To apply these standards, Cumberland's conduct must be analyzed by a contextual review of its 'total activities'")(quoting *Avoyelles*, 715 F.2d at 926)).

Nevertheless, even considering the thirty acre Site in isolation, it is undisputed that Brace family members pastured large farm animals on the Site for decades prior to 1977. Although pasturing cows and horses is not specifically enumerated in 33 U.S.C. § 1344(f)(1)(A) or 33 C.F.R. § 323.4(a)(1)(i) as an example of "normal farming activities," neither the government

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fair opportunity to assess the credibility of those who testified before it. The district court's decision was predicated upon clearly established facts, which even the government has not described as clearly erroneous. Consequently, the court of appeals should not have so cavalierly set aside the district court's findings of fact.

nor the court of appeals has indicated that pasturing cows and horses is not an aspect of "normal farming." Thus, at least until 1977, when Brace commenced tiling and refurbishing old drainage ditches throughout the homestead farm, the Site was indisputably part of an established, ongoing farming operation.

**2. Brace Was Engaged In "Normal Farming" Activities**

The narrower question, then, is whether Brace's conversion of pastureland into crop-bearing field in order to "integrate the various portions of the property into an overall operation for an effective and productive farming business," App., *infra*, 22a, constituted "normal farming activity." The court of appeals begged that question when it stated that "Brace converted a thirty-acre site that was not suitable for farming into a site that is suitable for farming, and thus 'brought an area into farming use.'" App., *infra*, 33a. Implicit in the court's holding is the proposition that Brace's work in preparation for growing row crops was itself not normal farming activity.

Brace did not bring the Site "into farming use," for it was never used for anything but farming. Before 1977, the farm including the Site was not only "suitable for farming," it was *actively farmed* by Brace family members. By working on his farm Brace did not suddenly make the Site "suitable for farming" or bring it "into farming use," for it already was farmland being farmed. Brace merely shifted from one type of farming to another type of farming. Obviously, that project could not be completed with a wink of the eye; it required work. How can and why should a farmer's diligent work to facilitate the transition from pasturing animals to growing crops be characterized as non-farming?

The court of appeals conflated the broad concept of "normal farming" with the much narrower activity of growing row crops. Growing row crops is only a subset of normal farming activity. The fact that Brace engaged in preparatory work in order to make the homestead farm suitable for the growing of row crops does not mean either that his preparatory work was non-farming or that prior to such work the Site was unsuitable for

normal farming activities. Indeed, prior to Brace's work, the Site was used for other normal farming activities, i.e., pasturing cows and horses.

The court of appeals isolated Brace's drainage activities and concluded that, standing alone, and "[r]egardless of how 'typical' or 'necessary' such activities are in Erie County, Pennsylvania, they were not "normal farming activities." That conclusion betrays common sense, for the impetus leading to the enactment of the normal farming activities exemption was the understanding that farmers frequently "dredge and discharge fill material" *as part of routine farming procedures*.[6]

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[6] The following exchange between Senators Allen and Muskie during the debates over the 1977 Amendments to the CWA illustrates that Congress specifically intended to spare the farming community from the type of wetlands regulation at issue in this case:

> MR. ALLEN. The wet crop and forest lands which are generally lowland or flood plain areas that fall under the corps 404 jurisdiction are where the exclusion of the minor drainage is needed. It serves no purpose whatsoever to exclude activities on upland or other areas that do not fall within the scope of the section 404 permit program, as the committee would seem to indicate, I trust then, that it is actually the committee's intent to exclude minor drainage activities on those lands such as I have described which are used for the production of food, fiber, and forest products. Am I correct?
>
> MR. MUSKIE. Mr. President, the drainage exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poor drained farm or forest land, of which millions of acres exist. No permits are required for such drainage. Permits are required only where ditches or channels are dredged in a swamp, marsh, bog, or other truly aquatic area.

4 *A Legislative History of the Clean Water Act of 1977* at 1042 (Senate Debate of August 4, 1977).

### a. Corps of Engineers' Examples of Normal Farming Activities Are Not Exclusive

The court of appeals based its holding on the fact that Brace's Site activities are not "within the meaning of the statutory term 'normal farming activities' as defined by the regulations." App., *infra.*, 35a. But the regulations do not purport to be all inclusive; they are merely examples. Both 33 U.S.C. § 1344(f)(1)(A) and 33 C.F.R. § 323.4(a)(1)(i) provide that unpermitted discharge of fill material is not prohibited if it results from "[n]ormal farming, silviculture and ranching activities *such as* plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices...." (Emphasis added). Manifestly, the six enumerated activities do not constitute a comprehensive definition of normal farming activities. By using the non-restricting modifier, "such as," Congress and the COE specifically left open the possibility that other activities, such as those performed by Brace, could fall within the ambit of "normal farming." *See Equal Employment Opportunity Comm'n v. McCarthy*, 768 F.2d 1, 4 (1st Cir. 1985)(regulatory definition referring to factors "such as" those specifically enumerated "is exemplary in nature, being neither mandatory nor exclusionary"); *Stellacom, Inc. v. United States*, 24 Cl. Ct. 213, 219 (Cl. Ct. 1991)(agency's use of non-restricting modifier indicates its intent that the regulation in question be construed non-exclusively).

The court of appeals need not, and should not, have focused *only* upon the examples of normal farming activity enumerated by Congress and the agencies. By doing so, the court artificially circumscribed the concept of "normal farming" and simultaneously overrode the clear intent of Congress. The statutory exemption provides that discharging fill material is not subject to COE regulation so long as such discharge is performed in the context of normal farming activity. The court of appeals judicially erased that exemption by unreasonably and inflexibly holding that the transition from the enumerated "normal farming" activities to other, unenumerated "normal farm-

ing activities." One wonders, as many farmers must now wonder, exactly why such activity is not normal farming.

### 3. Brace Engaged In Normal Farming Activity On A Continual Basis

The court of appeals also held that even if Brace's father's pasturing of cows and horses constituted "normal farming activity," Brace activity lost its status as part of an ongoing farming operation when Brace commenced ditch refurbishing and drainage tiling to make the soils throughout the homestead farm suitable for producing row crops. App., *infra*, 33a. The panel based its holding on 33 C.F.R. § 323.4(a)(1)(ii), which provides, *inter alia*, that "[a]n operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations." However, neither of the conditions set forth in the regulation exist in this case.

Brace did not convert the Site to "another use," as that phrase must be understood within the context of 33 U.S.C. § 1344(f)(1). Congress' fundamental purpose in enacting the "normal farming" exemption was to afford flexibility to farmers engaged in conventional farming activities.[7] Thus, the provision of 33 C.F.R. § 323.4(a)(1)(ii) stating that "[a]n operation ceases to be established when the area on which it was con-

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[7] During the Senate debate over the 1977 Amendments to the Clean Water Act, Senator Muskie (the legislation's primary sponsor) stated:

> The upland farming, forestry and normal development activity carried primarily by individuals and as a part of family business or family farming activity need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters....

ducted has been converted to another use" can only reasonably refer to the conversion of an area from a farming to a non-farming use. Interpreting the regulation so that it would encompass the conversion of one farming use to another farming use on the same parcel of land does not just limit the "normal farming" exemption; it eradicates it.

Petitioners' interpretation is buttressed by the second clause of the "ceases to be established" sentence in 33 C.F.R. § 323.4(a)(1)(ii), which provides that an ongoing farming operation ceases to be "established" when the "area has lain idle so long that modifications to the hydrological regime are necessary to resume operations." Given that 33 C.F.R. § 323.4(a)(1)(ii) purports to construe the Section 404(f)(1) "normal farming" exemption, the subject pervading the regulation is farming activity. Reading the entire sentence together, it is clear that only if (1) a farming use is abandoned in favor of a non-farming use, or (2) farming use is terminated for such a long period of time that modifications to the hydrological regime are necessary to resume normal farming, then the once-exempt farming operation ceases to be "established" for purposes of the normal farming activities exemption.

Notwithstanding that Brace was unable to plant row crops until several years after he began work on the farm, it is an un-

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> The initial response to section 404 was to interpret it so as to extend its potential jurisdiction over those normal activities which would subject citizens to overregulation, and we all began to get letters protesting that potential intrusion upon their normal activities.
>
> Every proposal before this Senate, every one, is designed to exempt those normal activities from that kind of overregulation by the Corps of Engineers or anybody else.

4 *A Legislative History of the Clean Water Act of 1977* at 869, 928 (Senate Debate of August 4, 1977).

disputed fact that his work was continual and ongoing. That is, at no point did the farm or the Site lay "idle." Brace should not lose the normal farming exemption merely because he could not *immediately* convert from pasturing to growing row crops. As the record shows, Brace had limited financial resources and performed much of the work himself, accomplishing each task as he was able. App., *infra*, 4a (¶21), 5a-6a (¶28).

The panel's construction of 33 C.F.R. § 323.4(a)(1)(ii) would require farmers to assume the burdens, costs and delays of the Section 404 permit process every time they desired to convert a pasture into a field of row-crops, or even convert one type of crop into another type of crop if the conversion involved a modification to the local hydrology. This interpretation is without support in the statute or legislative history, and with good reason, for it turns the normal farming activities exemption on its head. Under the court of appeals' arbitrary and capricious interpretation, the normal farming exemption, rather than eleminating overregulation, as Congress intended, would forever limit farmers to only those farming activities and methods currently utilized, forbidding any attempt to alter or intensify those activities without first petitioning COE for a permit.

### B. Brace Did Not Bring The Site Into A Use To Which It Was Not Previously Subject

In addition to proving that he qualifies under Section 404(f)(1)(A) for the normal farming activities exemption, the court of appeals concluded that Brace must establish that he was not "recaptured" by Section 404(f)(2) of the CWA, 33 U.S.C. § 1344(f))(2) (the "recapture provision"). Under the recapture provision, the exemptions enumerated in Section 404(f)(1) do not apply to any discharge of fill into wetlands "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2).

The recapture provision substantially overlaps the COE's regulation at 33 C.F.R. § 323.4(a)(1)(ii), discussed *supra*, in

that it withdraws the normal farming exemption from activities by persons who would attempt to farm never-before farmed wetlands without first obtaining a Section 404 permit. The applicable COE regulation interpreting the "recapture provision," however, is much more aggressive than the statute it purports to implement. 33 C.F.R. § 323.4(c) provides that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States."

The language of Section 404(f)(2) and the structure of Section 404 will not bear the construction embodied in 33 C.F.R. § 323.4(c). The recapture provision only makes sense when read as referring back to Section 404(f)(1). Thus, Section 404(f)(2) withdraws from the Section 404(f)(1) class of exempt activities those discharges which bring an area into a new use if the flow or circulation of navigable waters is impaired thereby. Two circumstances must exist before the recapture provision renders Section 404(f)(1) inapplicable. First, the otherwise exempt activity (e.g., normal farming) must be new in that the activity was not previously before practiced on the wetland at issue. Second, this new use must impair the flow or circulation of navigable waters. Unless both circumstances obtain, no permit is required under the recapture provision.

The COE, in 33 C.F.R. § 323.4(c), simply collapses the "activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject" provision into the "where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced" provision. The statutory test for recapture ("new use plus impairment of water flow") is reduced by the Corps' regulation into simply "impairment of water flow," which, if found, is neatly deemed to satisfy the new use requirement.

The COEs' interpretation of the recapture provision is neither reasonable nor authorized by Congress. If Congress had intended the recapture provision to render the enumerated exemptions inapplicable whenever the flow of navigable waters is impaired, it could have so provided. Instead, Congress created a two-pronged recapture provision. The COE should not be

permitted unilaterally to expand its jurisdiction by simply pretending the first prong (the new use requirement) does not exist.

The correct application of the recapture provision is illustrated in many prominent Section 404 cases, including several cited by the court of appeals. *See Conant v. United States*, 786 F.2d 1008 (11th Cir. 1986) *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344 (E.D. N.C. 1992). In each of these cases, the landowner acquired land which had not previously[8] been farmed and attempted to convert wetlands into non-wetlands before commencing normal farming activities. The courts in these cases appropriately rejected the landowners' claims of exemption because in each case the landowner would have had to convert the property into non-wetlands before commencing (for the first time on that property) farm activity. The combination of such new uses and concomitant impairment of water flow is exactly what Section 404(f)(2) was intended to prevent.

By contrast, *Brace* is a pure agricultural exemption case. Brace converted the Site from wetland into nonwetland, but not for the purpose of establishing a new (farming) use. As discussed above, Brace simply switched from one type of farming to another type of farming. That is precisely the type of normal farming activity Congress exempted from the Section 404 permit process, even if the flow of navigable waters is impaired in the process.

As such, the instant case is distinguishable from the cases relied upon by the court of appeals in support of its decision. In *United States v. Larkins*, 657 F. Supp. 76 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1989), the defendant landowners acquired 550 acres of flood plain property in 1976. The land,

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[8] In *United States v. Huebner*, 752 F. 2d 1235 (7th Cir. 1985), the subject property had not been farmed in decades.

parts of which was covered with knee deep water, had either never been farmed, or, at best, had not been farmed since 1950 when the State reintroduced beavers into the area. Although there was a complete absence of evidence of farming activity at any time, the landowner defendants unsuccessfully attempted to claim both the farming and silviculture exemptions.

In *Bayou Marcus Livestock & Agricultural Co. v. U.S. Environmental Protection Agency*, No. 88-30275, 1989 WL 206151 (N.D. Fla. Nov. 3, 1989), the plaintiff landowners acquired wetlands in 1985. Prior to 1971, the subject property was used, "if at all," for turpentine collection. Some tree harvesting by unknown persons occurred between 1971 and 1974. There was no evidence of any related activity on the land between 1974 and 1985. Upon acquiring the property, plaintiffs began digging ditches, removing trees and constructing roads, allegedly to prepare the site for tree farming. The court correctly rejected plaintiff's claimed farming/silviculture exemption for the obvious reason that their operation was not part of an ongoing farming or silviculture operation; rather, it was an attempt to establish, for the first time and by modifying the hydrology of the wetlands, a tree farm.

*Brace* is similarly distinguishable from the agricultural exemption cases commonly cited as authority unfavorable to landowners claiming the normal farming exemption. *See Conant v. United States*, 786 F.2d 1008 (11th Cir. 1986)(new construction of a fish farm not exempt because plaintiff's activity was not part of an established farming operation); *United States v. Huebner*, 752 F.2d 1235, *cert. denied*, 474 U.S. 817 (1985)(landowners attempted to expand existing farm by growing upland crops on *previously unfarmed* wetlands); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983)(plaintiffs drained 20,000 acres of wetlands in order grow soybeans on *previously unfarmed* land); *United States v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987)(landowners dredged 2,000 acre swamp for conversion to agriculture, a use to which the site was never before subject). These cases uni-

formly involve a landowner's conversion of wetlands into nonwetlands in order to bring previously unfarmed wetlands into agricultural use for the first time. Brace's conversion occurred on wetlands that were actively being, and had long been, used for normal farming activities.

The mischief worked by COE's regulatory overreaching can be seen in *United States v. Akers*, 785 F.2d 814, *cert. denied*, 479 U.S. 828 (1986). That case involved a farmer's construction of a two-mile long dike in connection with the drainage of nearly three thousand wetland acres known as the "Big Swamp." Despite the substantial factual dissimilarity between *Akers* and the instant case in terms of the sheer scale of operations,[9] the cases are legally similar in that *Akers* also involved property that had long been subject to normal farming activity. Yet the *Akers* court laid the groundwork for the Third Circuit's erroneous decision by arbitrarily holding that while changes from one wetland crop to another are not subject to the permit requirement, changes from a wetland farm activity to a nonwetland farm activity are subject to the COE permit program. *Id.* at 820. That distinction cannot be derived from the Clean Water Act. As discussed *supra*, the normal farming exemption is unavailable only to persons who would introduce farming for the first time (new use), *not* farmers who introduce a new type or method of farming on previously farmed land. The artificial distinction between wetland farming and nonwetland farming drawn by the Ninth and now the Third Circuit lacks textual and structural support in the CWA.

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[9] The court of appeals stated that the size of wetlands affected by farming activity is irrelevant to the scope of regulatory jurisdiction. App., *infra*, 34a-35a. Yet, as the *Akers* court noted, "It is ... the *substantiality* of the impact on the wetland that must be considered in evaluating the reach of [the recapture provision]." *United States v. Akers*, 785 F.2d at 822 (emphasis added).

By characterizing all conversions of wetland into nonwetland as a statutory "change in use," COE arbitrarily detached the recapture provision from the exemptions enumerated in Section 404(f)(1). But once the focus shifts from real-life changes in use accompanied by an impairment of the flow of navigable waters (Section 404(f)(2)) to *any* activity resulting in the conversion of wetlands into nonwetlands (33 C.F.R. § 323.4(c)) the regulatory jurisdiction of the COE dramatically expands beyond the bounds established by Congress.

The COE's regulation is not an exercise in legislative gap filling, for Congress unambiguously expressed its intent. The recapture provision does not remove active and ongoing farming operations from the exemption. Rather, by its own terms, the provision only reaches attempts to switch from non-exempt uses to exempt uses, where such attempts impair the flow of navigable waters. There is no ambiguity, and therefore no delegation of authority which would authorize the COE to expansively "elucidate" the recapture provision. The COE's regulation is thus a usurpation of legislative authority to which judicial deference is not required under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 838 (1984). *See, e.g., Pittston Coal Group v. Sebben*, 488 U.S. 104 (1988). Accordingly, based on the foregoing, this Court should grant certiorari to ensure that Congress' comprehensive and carefully crafted federal wetlands policy applicable to farmland and normal farming activities is not upset by regulatory overreaching and the court of appeals' erroneous decision.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1995

# APPENDIX

BEST AVAILABLE COPY

Filed December 17, 1993

**UNITED STATES OF AMERICA**
***Plaintiff***

v.

**ROBERT BRACE and**
**ROBERT BRACE FARMS, INC.,**
**a Pennsylvania Corporation,**
***Defendants***

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**Civil Action No. 90-229 Erie**

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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## ADJUDICATION

The above-captioned case was tried non-jury and a view of the site in dispute was conducted by the Court. The Court makes the following

## FINDINGS OF FACT

1. The United States has brought this action against Robert Brace, individually (hereinafter "Brace") and Robert Brace Farms, Inc., a Pennsylvania corporation (hereinafter "Brace Farms") (collectively, "Defendants"), alleging two counts of violations of the Clean Water Act (hereinafter "CWA").

2. Brace is a farmer who owns land in Erie County that is used exclusively for farmland. Brace Farms, Inc. is a Pennsylvania corporation engaged principally in the farming business.

3. Defendants own approximately 600 acres of real property located in Erie County, Pennsylvania, approximately 30 acres of which is the subject of the action ("site").

4. The parties have stipulated that the site constitutes "wetlands" as defined in the CWA and its implementing regulations. The Court's view indicated that not more than 25% of the site met the definition.

5. Wetlands constitute a productive and valuable resource, the unnecessary alteration or destruction of which constitutes a serious violation of the environmental laws, which should be discouraged as contrary to the public interest.

6. Wetlands perform vital functions important to the environment and public interest, including but not limited to: (a) serving water purification and water quality enhancement functions; (b) serving as storage areas for storm and flood waters; (c) serving natural biologic functions, including food chain production, general habitat, and resting sites for aquatic or land species, and (d) serving erosion and sedimentation control functions. 33 C.F.R. 320.4(b); 40 C.F.R. 230.41.

7. The site is adjacent to a tributary of Elk Creek, which is an interstate waterway.

8. Elk Creek is a tributary of Lake Erie, which is also an interstate waterway.

9. Brace's parents and other family members have always earned their principal livelihood from farming activities. While Brace was growing up, he lived on property that now includes the site. Brace has been a farmer since the age of fifteen.

10. Brace purchased certain farm property from his father in 1975. A portion of that property contains the site. The property has been in the Brace family since the 1930's, when Brace's grandfather farmed the land.

11. In years prior to the time that Brace's father owned the property that includes the site, the property had been used regularly for normal farming activities, such as cropland and pastureland for diary and beef cattle.

12. Brace's parents were in the farming business for their entire lives. Brace's father had used the site for normal farming activities during the time he owned the property. From time to time, Brace's father produced corn, hay, cabbage, oats and dry feed on the property that includes the site.

13. The soil in Erie County requires continuous draining in order to be suitable for cultivation. Extensive underground drainage systems are typical and necessary aspects of farming in Erie County, and the installation of such systems is a normal farming activity in order to make land suitable for farming.

14. The topography and soil type on the site are typical of Western Pennsylvania and of Erie County in particular. Beavers have traditionally lived on and around the site. Due to the presence of beaver dams that have affected the flow of water on the site, the site was traditionally inundated with water at various times.

15. The wildlife on the site consists of transient deer, geese, rabbits and other wildlife typical of the area and not uncommon to farmland in Erie County. The site does not serve as a wildlife refuge. The wildlife on the site has not changed from the time that Brace's father owned the land up to the present time.

16. Brace purchased the property from his father with the intent to continue and to improve upon his father's established farming operation. It was Brace's intent to integrate the various farmable portions of the property into an overall operation for an effective and productive farming business.

17. At the time Brace purchased the property containing the site from his father, the site was vegetated with areas of scrub brush, including red brush and briars. From 1977 to 1987, as a result of the work that Brace did in the late 1970's, the site was basically dry except in times of excessive precipitation, when under such circumstances, the site, like all other land in the area, would show evidence of a heavy rain.

18. From 1985 through 1987, the site was not used for either pasturing or growing of crops.

19. At the time Brace acquired the property in 1975, Brace's father had made the decision to use the site for pastureland due to the costs associated with other aspects of farming and limited available funds. Upon the purchase of the property, Brace leased the property to his brother, who continued the dairy practices for approximately one year and then removed the fencing used for pastureland and cleared portions of the pasture brush. The topography and water conditions of the site did not change during the time that Brace's brother leased the site.

20. Sometime subsequent to the purchase of the property from his father, Brace purchased an additional, adjacent 140 acres from his cousins that had the effect of increasing the total acreage to be used for Brace's overall and integrated farming plan to approximately 270 acres.

21. Due to the purchases of property from Brace's father and cousins, Defendants were highly leveraged in the late 1970's and the 1980's. At times, Defendants' service debt and operating expenses ranged from $500,000 to $700,000, the size of which affected the Brace's ability to do all of their work in one year; however, they were regularly doing something on the property.

22. In the late 1970's Brace developed gas wells on portions of the property he owns. No wells were developed on the site. Brace invested in the gas wells in order to help subsidize his farming operations over the years.

23. From 1975 to 1977, Brace began to make plans for the farming of his property. In 1977, Brace decided to seek the advice and assistance of the Agricultural Stabilization and Conservation Service (hereinafter "ASCS") as part of his land to develop an integrated farming operation on the property that includes the site. Brace's father had previously worked with the ASCS to prepare a drainage plan relating to the site for the purpose of farming the entire property. At the time he purchased the property for his father, Brace obtained the soil and conservation plans that had been prepared for his father by the ASCS

office in Erie County. The plan contains a map of the property and the layout of the drainage system on the property, including portions of the site. The plans were issued in the 1960's.

24. Brace utilized the existing drainage plan that had been implemented on the property that contains the site as part of his overall intention and design to establish a farming operation that would be interconnected and continuous throughout the property. The drainage system impacts the ability to produce crops on all parts of Brace's property; without such a system, the property is not suitable for farming because of soil conditions.

25. The existing drainage system was in poor condition and not yet complete at the time of Brace's acquisition. Therefore, in order to maintain, preserve and improve upon the existing system consistent with his farming plans, Brace began cleaning the system in 1976 in order to make it effective for agricultural development.

26. The drainage system included a design for channels and tiling to allow waters from adjoining croplands to be siphoned off and onto the site. In late 1976 and early 1977, Defendants implemented the first stage of the interconnected plan that had been recommended by the ASCS by reopening a channel to allow the water to flow in the natural direction. Defendants also installed tiling material on the site consistent with the ASCS recommendations.

27. Also, in 1977 Brace contacted the ASCS to inquire as to technical assistance and cost-sharing arrangements that might be available for the implementation of his plans. The ASCS visited the site prior to extending such assistance and thereafter provided such advice and assistance to Brace, continuing to do so up to 1985. The site and the farming activities conducted thereon were never concealed from the Plaintiff, other departments of the federal government or state agencies.

28. As of 1977, the essential portions of Brace's improvements to the already existing drainage system on the site were intact and operating. In subsequent years, Brace maintained the

system, consistent with his overall plans and as is necessary for typical framing activities in Erie County, as time, funds and equipment were available. If all of the necessary funds had been available to him in 1977, Brace would have expedited his farming plans and completed the project at that time.

29. The maintenance of the drainage system that Brace performed on the site from 1977 to 1979 enhanced Brace's farming productivity in the upland areas and was necessary to conserve the soil and water conditions in those areas.

30. From 1977 to 1979, Defendants continued to maintain the drainage system by cleaning it and removing sedimentation to enhance water flow. The site was dry at the end of 1979 as a result of such maintenance, with the exception of times of excessive rainfall when it, like areas located off site, would become wet.

31. In the late 1970's and early 1980's, as part of the maintenance of the drainage system, Brace introduced a series of small channels that were connected to the initial channel and were part and parcel of the initial work. The small channels enhanced the flow of surface water off of the uplands to its natural courses.

32. Defendants' work in improving upon the interconnected drainage system progressed continuously from 1977 to 1987. Brace worked on the system when funds, time and equipment were available. Brace's wife, two sons and a hired worker assisted in the farming activities, and Brace regularly worked the site.

33. From 1985 through 1987, Brace cleared, mulched, churned, levelled and drained the formerly wooded and vegetated site.

34. In 1986 and 1987, Brace Farms paid for excavation in the site and the burying of plastic tubing, sometimes referred to as "drainage tile," in an effort to drain the site.

35. Throughout the 1980's, in order to continue to improve upon the drainage system that began in 1977, Brace used appropriate equipment to remove unconsolidated soil, pebbles,

silt and growth which were impeding water flow and tied certain lateral channels to the existing system to further enhance water flow. These activities were part of the overall maintenance of the drainage system, and farmers in the Erie County area typically engage in such practices.

36. Defendants did not have a permit issued pursuant to CWA section 404 authorizing their activities.

37. As a result of Defendants' levelling, spreading and tiling, Defendants began to grow crops on the site in 1986 and 1987.

38. Since 1977, Defendants have planted and harvested cabbage, oats, hay and other grains on portions of the property. In 1986, Defendants planted oats and alfalfa hay on portions of the site because Brace believed that it was the proper time to do so.

39. The United States became aware of Defendants' activities in 1987.

40. Between 1987 and 1988, the United States issued three orders to Defendants, ordering them, *inter alia*, to refrain from further disturbances of the site, so that the site could naturally revegetate with indigenous plant species.

41. After the issuance of these orders, Defendants continued to mow the vegetation on the site.

42. In October 1988, Brace received an Administrative Complaint in connection with his farming activities on the site. Brace, as he was advised he could do, requested a hearing to contest the Complaint, believing that his activities were exempt from any and all permit requirements. Prior to the hearing, the Complaint was dismissed.

43. In the summer of 1988, Brace approached the ASCS in order to gain the status of "commenced conversion from wetlands" with respect to the site for purposes of the Federal Food Security Act. The ASCS granted this status to the site, finding that Brace's on-going farming activities had commenced prior to December 1985.

44. In April 1990, as a cautionary measure, Brace approached the Army Corps of Engineers (hereinafter "COE") in an effort to obtain an after-the-fact permit to conduct his farming activities on the site, despite his belief that the activities were and are exempt from permit requirements of the CWA. The United States Environmental Protection Agency (hereinafter "EPA") requested that COE not review an application from Brace for an after-the-fact permit. However, Brace was advised that because the matter was then in litigation, the government would not positively act on his request for a permit.

45. Since 1977 Defendants' activities on the site have consisted only of normal farming activities, maintenance of the existing drainage system, and activities to enhance and conserve the upland soil and water on the farm property. Since the time of the cease and desist order, Brace has terminated all farming activity on the site, with the exception of routinely cutting the hay. Brace has not disturbed the soil on the site in any significant or meaningful way since being served with the cease and desist order. Brace has continued to farm the adjacent areas but has not achieved the full benefit of the overall integrated plan that he hoped to accomplish due to his present inability to continue his farming activities on the site.

**DISCUSSION**

This litigation involves a 30-acre area located in Waterford Township, Erie County, Pennsylvania. The parties entered into a pretrial stipulation that the 30-acre site was wetlands as defined at 33 C.F.R. § 328.3(b), and 40 C.F.R. § 232.2(r). This Court accepts this stipulation for purposes of this lawsuit but notes that our view of the site indicated that only approximately 25% of the site would fall within the aforementioned definition of wetlands.

The property in question has been owned by the defendant, Robert Brace, since 1975 when he purchased it from his father, Charles Brace. Charles Brace acquired the land in the early 1950's, having bought the adjoining lands from his father, Leslie Brace, who had owned the land since the 1930's.

We perceive this case as simply calling for a determination of whether or not the Defendants' activities on their farm lands entitled them to an exemption from the permit requirements of the CWA, 33 U.S.C. §§ 1251-1387, as normal agricultural activities.

33 U.S.C. § 1344(c)(1)(A) provides a narrow exemption to the general requirement of a Section 404 permit. *See* 33 U.S.C. § 1344. This exemption defines as non-prohibited discharge of dredged or fill material that which is incident to "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices."

At the center of this statutory dispute is the subquestion of whether or not Defendants' activities over the years on the site were part of an effort to establish a new crop production operation or a part of the long history of various agricultural practices and uses consistent with those utilized by farmers in Erie County, Pennsylvania.

This Court is persuaded and concludes that the subject site was during the entire period of time that ownership rested in the Brace family, an integral part of an established and on-going farm and ranching operations, and Defendants' activities during the time frame of 1985-1987 did not bring a new area into the operation. A key factor in reaching this conclusion is this court's realization that the site was an integral part of the drainage system previously installed in adjoining crop producing fields. Defendants planted and harvested oats and other crops from the site area and that during the period of 1975 through 1987, they cleared brush and cropped hay from the site.

What comprises "normal agricultural activities" is fact specific and this Court herein makes findings of fact (Findings of Fact Nos. 16, 19, 20, 23, 24, 28 and 58) that the Defendants were engaged in normal agricultural activities on the site. (See Conclusions of Law No. 32).

We conclude that the land which can be traced to Robert

Brace's grandfather, Leslie, in the 1930's has been in continuous use for what would be a normal farming operation in Erie County, Pennsylvania. As we wrote in this Court's Opinion, addressing the parties' Motions for Partial Summary Judgment, "[t]his certainly does not appear to be the type of case where a corporation or large farming enterprise takes control of a parcel of land and dramatically alters the composition of the land and runs roughshod over the requirements of the Clean Water Act." *See, United States v. Akers, 785 F.2d 814 (9th Cir. 1986) (2,889 acres of wetlands); and United States v. Cumberland Farms of Connecticut,* 647 F. Supp. 1166 (D. Mass. 1986) (2,000 acres of wetlands). Here the parcel of land in question has remained within the same family for over 60 years and there has existed a plan to over a period of time, with the financial help and guidance of United States Department of Agricultural programs, to place the entire farm to productive farm usage. This plan and the Defendants' efforts to reach its goal, as financing permitted, was not directed to converting in the mid 1980's a regulation defined wetland area to a new crop production area.

Likewise, this Court finds that the Defendants' activities on the site constituted an integral part of long-range upland soil and water conservation practices. The farming activities on the site were designed to enhance productivity in the upland areas by allowing water to flow to its natural courses with a consequential improvement of the soil. Such courses of action, together with regularly cleaning of the drainage system on the site, constituted maintenance of the drainage system on the site, constituted maintenance of the drainage system, and as such, is exempt from the permit requirements of the CWA. 33 U.S.C § 1344(f)(1)(c).

The Government also argues that the Defendants have not shown that they can avoid the recapture provision of section 404 (f)(2) of CWA. Since this Court, as the factfinder, concludes that the Defendants' activities were not conducted in order to bring the site property into a use to which it was not

previously subject, but rather were part of an ongoing farming operation of the Brace family for some 60 years and did not impair the flow or circulation of navigable waters or the reduction of the reach of such waters, it follows that the recapture provision does not apply to this case. A similar result is reached relative to the maintenance of a drainage ditch since such maintenance would not convert wetlands to a use to which the site area was not previously subject.

Now we address what for the Court is the most difficult aspect of this case, namely, that the Defendants failed to totally comply with Administrative Orders issued to them, requiring them to cease and desist all activities on the site. Although the Defendants continued only to routinely cut the hay on the site, their general response to the Administrative Orders were to request a hearing, seek the status under ASCS of a prior 1985 "commenced conversion from Wetlands" and contact the COE in an effort to obtain an after-the-fact permit to conduct farming activities on the site.

However, since the Defendants have not disturbed the soil on the site in any significant way since being served with the cease and desist orders, and in the view of this Court acted only out of sincere conviction, although undoubtedly misguided, we will not hold the Defendants liable in this litigation for being in contempt or non-compliance with said Administrative Orders.

This Court finds the Defendants not liable for violations of the Clean Water Act because we conclude that they are entitled to the exemptions allowed by Section 404(f)(1)(A) of the Act and for the other reasons set forth herein we find all liability issues in favor of the Defendants.

An appropriate order will be filed.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction under CWA § 309(b), 33 U.S.C. § 1319(b) to grant injunctive relief and impose civil penalties with respect to violations of the CWA.

2. Under CWA § 309(b). 33 U.S.C. § 1319(b), this Court is empowered to order permanent injunctive relief enjoining all future violations of the CWA at a site.

3. The CWA was passed to restore and maintain the chemical, physical, and biological well-being of the Nation's waters. Section 301(a) makes it unlawful for a person to discharge pollutants into "waters of the United States" except as in compliance with other provisions of the Water Act. One of those sections is § 404, which requires a permit from the COE for the discharge of dredged or fill material into waters of the United States, including wetlands. 33 U.S.C. § 1311, 1344.

4. "Wetlands" are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. 33 C.F.R. § 328.3(d). To be a wetland an area must be inundated or saturated by surface or ground water for long enough periods of time so that plants that are adapted to wet conditions or that can live in saturated soils are dominant plant species in that area. The term "prevalence of vegetation" refers to vegetation that is dominant in an area or that covers most of a given area under normal circumstances. Normal circumstances simply means the condition of an area when undisturbed by man.

5. The parties have stipulated, and this Court concludes, that the site constituted wetlands at the time of Defendants' activities.

6. The term "waters of the United States" means all waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce, including all wet-

lands which are adjacent, neighboring or bordering to tributaries of waters which are or may be used in interstate commerce. In addition, a wetland is "waters of the United States" if the use, degradation or destruction of it could effect waters which are or could be used by interstate of foreign travelers for recreational or other purposes, or from which fish or shellfish are or could be taken and sold in interstate or foreign commerce. "Waters of the United States" are also tributaries of the waters described above. Wetlands adjacent to any of these waters are also waters. The term "adjacent" means bordering, contiguous, or neighboring. 33 C.F.R. § 328.3(a).

7. The Court concludes that the site constituted waters of the United States at the time of Defendants' activities.

8. The term "pollutant" is broadly defined in the Clean Water Act to include "dredged spoil, solid waste, . . . rock, sand, . . . biological materials, . . . and agricultural waste discharged into water." 33 U.S.C. § 1362.

9. Dredged or fill material consisting of "dredged spoil, solid waste, . . . rock, sand, . . . biological materials, . . . and agricultural waste" constitutes a "pollutant" within the statutory definition. 33 U.S.C. § 1362.

10. "Fill material" means "any material which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a waterbody for any purpose." 40 C.F.R. § 232(i).

11. Defendants' clearing, churning, mulching, levelling, grading, and landclearing of the formerly wooded and vegetated site was a discharge of dredged spoil, biological material, rock and/or sand, each of which is defined as a pollutant by the CWA, which change the bottom elevation of the site.

12. Despite the prohibition against discharge of pollutants under the CWA, a person may obtain a permit for the discharge of any pollutant upon meeting certain applicable requirements of the CWA. 33 U.S.C. § 1342.

13. The CWA contains explicit exemptions from the permit requirements. Specifically, a permit is not necessary for the

"discharge of dredged or fill material (a) from normal farming, silviculture and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices," . . . or (c) "for the purpose of . . . maintenance of drainage ditches, . . . 33 U.S.C. § 1344(f)(1)(A), (C).

14. A permit is not required for an activity that would not "destroy or degrade" waters of the United States because it would have only a *de minimus* effect on such waters. The discharger bears the burden of demonstrating that its activity will not destroy or degrade waters of the United States. 33 C.F.R. § 232.2, *as amended.*

15. For purposes of the regulations dealing with exemptions, "an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States." 33 C.F.R. § 232.2, *as amended.*

16. For purposes of the regulations dealing with exemptions, "an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a de minimus (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function." 33 C.F.R. § 232.2, *as amended.*

17. In order to qualify for the exemption from the permit requirements for "normal farming," 33 U.S.C. § 1344(f)(1)(A) the activities at issue "must be part of an established (i.e., ongoing) farming, silviculture or ranching operation." 33 C.F.R. § 323.4(a)(1)(i).

18. This case is not the type of case where a corporation or large farming enterprise takes control of a parcel of land and dramatically alters the composition of the land and runs roughshod over the requirements of the Clean Water Act. It is a case of a legitimate factual dispute regarding the use of a parcel of land that has remained within the same family for over half of a century.

19. The determination of "normal agricultural activities" is a "fact specific" inquiry.

20. The existence of "normal farming" activity turns on an analysis of whether farming activities are "established and continuing."

21. Normal farming activities within the exemptions from the permit requirements of the CWA connote and establish a "continuing activity." They are activities that occur on a continuing basis as part of an ongoing farming or forestry operation.

22. The normal farming exemption will apply where land has been subjected to an established upland farming operation.

23. Section 404(f)(1)(C) of the CWA, 33 U.S.C. § 1344(f)(1)(C), "specifically provides that dredge or fill discharges for the purpose of maintenance (but not construction) of drainage ditches are exempt" from the permit requirements.

24. "Maintenance of a drainage ditch" means "the physical preservation of the original, as-built configuration of the ditch. Maintenance includes the removal of accumulated sediment and debris."

25. Unlike the farming activity exemption found in Section 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A), there is no "ongoing" requirement associated with the "maintenance of a drainage ditch" exemption. Maintenance must be interpreted in the context of an "as needed basis," and there is no requirement in the CWA that it must be carried out in a precise or specified way.

26. Notwithstanding the exemptions from the permit requirements, under the "recapture provision" of the CWA, 33 U.S.C. § 1344(f)(2), certain activities do require a permit. Specifically, a permit will be required where "discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced. 33 U.S.C. § 1344(f)(2).

27. In order to prevail on a claim there the recapture provision applies in this case, two elements must be established. First, it must be established that Brace's activities were conducted in order to bring the property into a use to which it was not previously subject. Second, if this element is established, it must then be established that Brace's activities will impair the flow or circulation of navigable waters or will reduce the reach of such waters. Both elements must be satisfied in order for the recapture provision to apply. The Court finds that neither element has been proven in this case.

28. The recapture provisions of the CWA clearly apply only to an area of navigable waters that is brought "into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2).

29. For the purposes of determining whether a discharge associated with the "maintenance of a drainage ditch" is recaptured under Section 404(f)(2), 33 U.S.C. § 1344(f)(2), it is necessary to determine whether such maintenance activities would convert wetlands to a use to which the area was not previously subject.

30. This case involves a thirty-acre site that has been part of an ongoing farming operation of the Brace family for more than half a century. The land is not being converted to a use to which it was not previously subject, nor has significant impairment to the reach or flow of waters been proven. Accordingly, the Court finds that the recapture provision does not apply to this case.

31. Defendants' activities in commencing conversion of the site prior to December 23, 1985, and in obtaining status as "commenced conversion" from the ASCS are evidence that Brace and Brace Farms have established an ongoing farming operation on the site.

32. Under the exemption provisions of the CWA, the activities of Brace and Brace Farms do not require a permit because they constitute: (a) normal farming activities; (b) upland soil and water conservation practices; and, (c) maintenance of drainage ditches.

33. Brace has testified that his farming activities on the site enhanced productivity in the upland areas due to improvements in water flow, by which water flowed to its natural courses, and the corresponding improvements to the soil. The Court finds that Brace's activities on the site constitute upland soil and water conservation practices and are thereby exempt from the permit requirements.

34. Based upon the testimony and documentary evidence of Defendants' conduct in preserving and regularly cleaning the existing drainage system on the site, the Court finds that such conduct constitutes maintenance of the drainage system, and as such, is exempt from the permit requirements of the CWA.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**UNITED STATES OF AMERICA**
**Plaintiff**

**v.**

**ROBERT BRACE and**
**ROBERT BRACE FARMS, INC.,**
**a Pennsylvania Corporation,**
**Defendants**

**Civil Action No. 90-229 Erie**

**ORDER**

AND NOW, this _____ day of December, 1993, after a non-jury trial bifurcated as to liability and upon Findings of Fact, Conclusions of Law and reasons set forth in the accompanying Adjudication,

IT IS HEREBY ORDERED that Judgment is entered in favor of the Defendants, Robert Brace and Robert Brace Farms, Inc., a Pennsylvania Corporation, and against the Plaintiff, United States of America.

_____

United States District Judge

Filed November 22, 1994

# IN THE
# UNITED STATES COURT OF APPEALS
# FOR THE THIRD CIRCUIT

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NO. 94-3076

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UNITED STATES OF AMERICA,
*Appellant.*

*v.*

ROBERT BRACE; ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,

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**On appeal from the United States District Court**
**for the Western District of Pennsylvania**
**(D.C. Civil No. 90-cv-00229E)**

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## PETITION FOR A WRIT OF CERTIORARI

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Argued September 19, 1994

Before: BECKER and COWEN, Circuit Judges

and POLLAK*, District Judge

(Filed: November 22, 1994)

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*Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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## OPINION OF THE COURT

**COWEN, Circuit Judge.**

The United States brought this action in the United States District Court for the Western District of Pennsylvania against Robert Brace, individually, and Robert Brace Farms, Inc., a Pennsylvania corporation (collectively, "Brace" or "defendants"), alleging violations of the requirement in Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, that a permit be obtained for the discharge of dredged or fill material into waters of the United States. The United States sought restoration of the site, a permanent injunction and civil penalties pursuant to 33 U.S.C. § 1319(d).

The district court bifurcated the action: a trial on liability issues and a trial on remedy issues. Shortly before the liability trial, Brace stipulated that at the time of the discharges, "the approximately thirty-acre site that is the subject of this lawsuit was wetlands as defined at 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2(r)." Pre-Trial Stipulation (Dec. 16, 1993); Appendix ("App.") at 40.

The United States, either by stipulation or at trial, established the five elements of a prima facie case for violations of Section 404 of the CWA: (1) defendants admitted that they are "persons" within the meaning of the CWA; (2) defendants admitted that the activities at the site were conducted without a permit; (3) defendants stipulated that the site was a wetland at the time of the discharges; (4) the district court held that the site constituted waters of the United States at the time of defendants' activities; and (5) the district court held that defendant's clearing, mulching, churning, and levelling of the formerly wooded and vegetated site constituted a discharge of pollutants into the waters of the United States and that defendants paid for excavation and installation of drainage tubing in an effort to drain the site.

Brace asserted, and the district court held, that the discharges were exempt from the permit requirement under Section 404(f)(1). The court concluded that: (1) Brace's activities on the wetland constituted "normal farming activities" exempt under Section 404(f)(1)(A); and (2) Brace's activities constituted "upland soil and water conservation practices" also exempt under that same provision of the CWA. *United States v. Brace*, C.A. No. 90-229 (W.D. Pa. Dec. 16, 1993), slip op. at 22-23. In addition, the court found that Brace's conduct in "preserving and regularly cleaning the existing drainage system on the site" was exempt from the permit requirement as "maintenance of the drainage system" under Section 404(f)(1)(C). *Id.* at 23. The court also held that the recapture provision of Section 404(f)(2) does not apply to this case because "[t]he land is not being converted to a use to which it was not previously subject, nor has significant impairment to the reach or flow of waters been proven." *Id.* at 22.

The district court entered judgment in defendants' favor. We hold that the district court incorrectly applied the requirements of the CWA permit exemption provisions. We will reverse the order of the district court and remand the case to determine the appropriate remedy.

## I.

Brace is a farmer who owns approximately 600 acres of real property in Erie County, Pennsylvania, including the subject thirty-acre wetland site ("the site"). Brace Farms, Inc. is a Pennsylvania corporation engaged principally in the farming business. Brace's parents and other family members have always earned their principal livelihood from farming activities. Brace purchased a parcel of farm property from his father in 1975. A portion of that property contains the site. The property has been in the Brace family since the 1930's when Brace's grandfather farmed the land. Prior to 1975, Brace's father used the site for pasturing of cows and horses, and Brace's brother used the site for pasturing cows until 1976.

Brace purchased the property from his father with the intent of continuing and improving his father's established farming operation. It was Brace's intention to integrate the various portions of the property into an overall operation for an effective and productive farming business. At the time Brace purchased the property containing the site from his father, the site was vegetated with areas of scrub brush, including red brush and briars.

In 1977, Brace sought the advice and assistance of the Agricultural Stabilization and Conservation Service ("ASCS") as part of his plan to develop an integrated farming operation on the property that includes the site. The ASCS is "an agency of the United States Department of Agriculture which is generally responsible for administering commodity production adjustment and certain conservation programs of the Department." 7 C.F.R. § 12.2(a)(2) (1994). Brace's father had previously worked with the ASCS to prepare a drainage plan relating to the site for the purpose of farming the entire property. At the time he purchased the property from his father, Brace obtained and utilized the soil and conservation plans that had been prepared for his father by the ASCS. The drainage system impacts the ability to produce crops on all parts of Brace's property.

The existing drainage system was in poor condition and not yet complete at the time of Brace's acquisition. Brace began cleaning the system in 1976 in order to improve upon the existing system and make it effective for agricultural development. In the following years, Brace maintained and improved the drainage system pursuant to the plan recommended by the ASCS. From 1977 to 1985 the ASCS periodically visited the site and provided technical assistance and cost-sharing arrangements to Brace.

As of 1977, the essential portions of Brace's improvements to the existing drainage system were intact and operating. Brace's work in improving upon the interconnected drainage system progressed continuously from 1977 to 1987, as time, funds and equipment were available. If the necessary funds had

been available to him in 1977, Brace would have expedited his farming plans and completed the project at that time. As a result of Brace's efforts, by the end of 1979 the site was dry, with the exception of times of excessive rainfall.

Brace cleared, mulched, churned, levelled, and drained the formerly wooded and vegetated site from 1985 through 1987. In 1986 and 1987, Brace paid for excavation in the site and the burying of plastic tubing or "drainage tile" in an effort to drain the site. Throughout the 1980's, Brace used appropriate equipment to remove unconsolidated soil, pebbles, silt, and growth which were impeding water flow. Farmers in the area typically engaged in such practices.

As a result of Brace's levelling, spreading, and tiling, Brace began to grow crops on the site in 1986 and 1987. Brace did not have a permit issued pursuant to Section 404 of the CWA authorizing his activities.

The United States became aware of Brace's activities in 1987. During 1987 and 1988, the United States issued three orders to Brace, directing him, *inter alia*, to refrain from further disturbing the site, so that it could naturally revegetate with indigenous plant species. After the issuance of these orders, Brace continued to mow vegetation on the site. In October of 1988, Brace received an administrative complaint in connection with his farming activities on the site. Brace requested a hearing to contest the complaint, believing that his activities were exempt from any and all permit requirements. Prior to the hearing, the complaint was dismissed.

In the summer of 1988, Brace approached the ASCS in order to gain the status of "commenced conversion from wetlands" prior to December 23, 1985 with respect to the site. The ASCS was authorized to make such a determination under the Food Security Act of 1985, 16 U.S.C. §§ 3801, *et seq*. This Act contains a provision, referred to as the "Swampbuster," which denies certain Department of Agriculture benefits to farmers who produce an "agricultural commodity on converted wetland," unless such conversion commenced before December

23, 1985. 16 U.S.C. §§ 3821, 3822 (1988 & Supp. V 1993).

The ASCS granted the status to the site, finding that Brace's on-going farming activities had commenced prior to December of 1985, which would enable Brace to complete conversion and produce an agricultural commodity without losing USDA benefits. Letter from Erie County ASCS Office to Robert Brace (9/21/88); App. at 172. However, the ASCS expressly noted that "[t]he granting of a commencement... request does not remove other legal requirements that may be required under State or Federal water laws." USDA Form; App. at 173.

In April 1990, as a cautionary measure, Brace approached the Army Corps of Engineers ("COE") in an effort to obtain an after-the-fact permit to conduct his farming activities on the site, despite his belief that the activities were exempt from the permit requirements of the CWA. The United States Environmental Protection Agency ("EPA") requested that the COE not review an application from Brace for an after-the-fact permit. Brace was advised that because the matter was then in litigation, the government would not act on his request for a permit. Since the time of the cease and desist orders Brace has terminated farming activity on the site except for routinely mowing the vegetation.

II.

The district court exercised its jurisdiction pursuant to 33 U.S.C. § 1319(b) (1988) and 28 U.S.C. §§ 1331, 1345, 1355 (1988 & Supp. V 1993). Our jurisdiction rests on 28 U.S.C. § 1291 (1988).

Presently, there are three issues before us. The first issue is whether the district court erred in determining that Brace's discharges of dredged and fill material into the wetland were exempt from the permit requirement pursuant to Section 404(f)(1) of the CWA, 33 U.S.C. § 1344(f)(1). The second issue is whether the district court erred in determining that Brace's discharges were not "recaptured" by the permit requirement under Section 404(f)(2) of the CWA, 33 U.S.C. § 1344(f)(2). We have plenary review over the question of whether the district

court erroneously interpreted the meaning of the applicable statutes. *Moody v. Sec. Pac. Business Credit, Inc.*, 971 F.2d 1056, 1063 (3d Cir. 1992); *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 124 (3d Cir. 1991). To the extent that the court's ruling on these issues was also premised on findings of fact, we review any such findings under the clearly erroneous standard. *Zenith Radio Corp. v. Hazeltime Research, Inc.*, 395 U.S. 100, 108, 89 S. Ct. 1562, 1568 (1969); *Sheet Metal Workers Int'l Ass'n Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1278 (3d Cir. 1991).

The third issue is whether the district court erred in determining that Brace was not subject to liability for violations of administrative orders. Our review of questions of law such as this is plenary. *Moody*, 971 F.2d at 1063; *Manor Care*, 950 F.2d at 124.

## III.

The Clean Water Act was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1988). Section 301(a) of the CWA prohibits the discharge of any pollutant into navigable waters of the United States, unless the discharge is authorized by a permit. 33 U.S.C. §§ 1311(a), 1362(12) (1988). We recognize that:

> The Act defines the operative terms of this prohibition broadly. The term "pollutants" includes fill material such as "dredged spoil, . . . rock, sand, [and] cellar dirt," 33 U.S.C. § 1362(6), and "navigable waters" means "the waters of the United States," *id.* § 1362(7). In so defining the term "navigable waters," Congress expressed a clear intent "to repudiate limits that had been placed on federal regulations by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of the term."

*United States v. Pozsgai*, 999 F.2d 719, 724 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1052 (1994) (citations

omitted). The district court found that Brace's clearing, churning, mulching, levelling, grading, and landclearing of the formerly wooded and vegetated site was a discharge of a dredged spoil, biological material, rock and/or sand, each of which fits the definition of pollutant. *Brace*, slip op. at 18.

Section 404 of the CWA authorizes the Secretary of the Army, through the COE, to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (1988). *See also* 33 C.F.R. § 323.1 (1993). The permit program, as we recognized in *Pozsgai*, "is the central enforcement tool of the Clean Water Act . . . Unpermitted discharge is the archetypical Clean Water Act violation, and subjects the discharger to strict liability." 999 F.2d at 724-25.

The COE and EPA have issued regulations defining the term "waters of the United States" to include "wetlands," among other bodies of water:

> (a) The term *waters of the United States* means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; . . .
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), . . . wetlands, . . . the use, degradation or destruction of which could effect interstate or foreign commerce. . .
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section . . .
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a) (1993); 40 C.F.R. § 230.3(s) (1993) (emphasis in original). The district court found that the site constituted waters of the United States at the time of Brace's activities. *Brace*, slip op. at 17. The term "wetlands" is defined

as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. § 328.3(b); 40 C.F.R. § 230.3(t). The parties have stipulated that the site constituted wetlands at the time of Brace's activities.

Exemptions to the general requirement for a Section 404 permit are contained in Section 404(f) of the CWA. Under Section 404(f)(1), a permit is not required for: (1) the discharge of dredged or fill material "from normal farming, silviculture, and ranching activities such a plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices," 33 U.S.C. § 1344(f)(1)(A); and (2) the discharge of dredged or fill material "for the purpose of . . . the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(C).

The COE and EPA have promulgated regulations which provide that the "normal farming activities" exemption is available only to discharge activities that are "part of an established (*i.e.*, on-going) farming . . . operation," and expressly stipulate that the exemption is *not* available either: (1) for "[a]ctivities which bring an area into farming . . . use"; or (2) where "modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii) (1993); 40 C.F.R. § 232.3(c)(1)(ii)(A), (B) (1993).

This provision further requires that, to be exempt from the permit requirement, such activities "must be in accordance with definitions in 33 C.F.R. § 323.4(a)(1)(iii)." 33 C.F.R. § 323.4(a)(1)(ii). The definitions in 33 C.F.R. § 323.4(a)(1)(iii) provide that "the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing."

33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). The definitions also define "minor drainage" as meaning "[t]he discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands." 33 C.F.R. § 323.4(a)(1)(C)(1)(i); 40 C.F.R. § 232.3(d)(3)(i)(A). This latter definition is modified by 33 C.F.R. § 323.4(a)(1)(iii)(C)(2) and 40 C.F.R. § 232.3(d)(3)(ii), which further provide that the term minor drainage "does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland . . . . or conversion from one wetland use to another."

The COE has also promulgated definitions concerning the second exemption to the permit requirement, i.e. the exemption for the maintenance of drainage ditches. The definitions provide that the exemption from the permit requirement applies to "maintenance (but not construction) of drainage ditches." 33 C.F.R. § 323.4(a)(3).

Even where Section 404(f)(1) exempts a discharge from the permit requirements, the discharge may be "recaptured" by the permit requirement under Section 404(f)(2):

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2). The regulation governing the "recapture" provision stipulates in part that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States," 33 C.F.R. § 323.4(c), and states as an example, that "a permit will be required for the conversion of a cypress swamp to some other use . . . when there is a discharge of dredged or fill material into waters of the

United States in conjunction with construction of . . . structures used to effect such conversion." *Id.*

Thus, to be exempt from the CWA permit requirement, a defendant has the burden of demonstrating that proposed activities both *satisfy* the requirements of Section 404(f)(1) and *avoid* the recapture provision of Section 404(f)(2). *United States v. Akers*, 785 F.2d 814, 819 (9th Cir.), *cert. denied*, 479 U.S. 828, 107 S. Ct. 107 (1986). *See also United States v. Cumberland Farms*, 647 F. Supp. 1166, 1176 (D. Mass. 1986) ("[E]ven if [defendant] could establish that it is exempt from the permit requirements under § 1344(f)(1), it must also demonstrate that its activities avoid 'recapture' under the provisions of 33 U.S.C. § 1344(f)(2)."), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061, 108 S. Ct. 1016 (1988). Read together, the two parts of Section 404(f) provide a narrow exemption for agricultural activities that have little or no adverse effect on the waters of the United States. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983). Congress intended this narrow exemption. As Senator Muskie, one of the primary sponsors of the CWA, explained:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do no apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

3 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act*, at 474 (1978).

## IV.

The district court held that Brace's activities on the thirty-acre wetland site were exempt from Section 404's permit re-

quirement "because they constitute: (a) normal farming activities; (b) upland soil and water conservation practices; and (c) maintenance of drainage ditches." *Brace*, slip op. at 22. We find that the district court's determination is erroneous as a matter of law.

The district court's conclusion that Brace's discharges on the thirty-acre site constituted "normal farming activities" which are exempt from Section 404's permit requirement cannot be reconciled with the statute, the applicable regulations, and case law governing the "normal farming activities" exemption. As we described above, Section 404(f) of the CWA provides exemptions to the general permit requirement, including the discharge of dredged or fill material without a permit in connection with "normal farming . . . activities such as plowing, seeding, cultivating, minor drainage, harvesting . . . or upland soil and water conservation practices." 33 U.S.C. § 1344(f)(1)(A). In determining that Brace's activities fell within this provision, the district court relied on facts that are irrelevant to the inquiry required by the applicable law. The district court appears to have based its conclusion on a casual observation that what Brace did was "normal" activity for a farmer in Erie County, rather than on the application of the regulatory construction accorded the statutory term "normal farming activities" by the agencies charged with the implementation of the statute.[1]

The applicable regulation provides that, to constitute "normal farming activity" within the meaning of the statute, the activity:

> must be part of an established (i.e., on-going) farming . . . operation and must be in accordance with the definitions in § 323.4(a)(1)(iii) . . . . Activities which bring an area into farming . . . use are not part of an established operation. An operation ceases to be established when the area on

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[1] See 33 U.S.C. §§ 1251(d) and 1344 for the implementation authority of the EPA and COE.

> which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

33 C.F.R. § 323.4(a)(1)(ii). Brace's activities between 1985 and 1987 meet neither prong of this provision: they were neither part of an "established (i.e., on-going) farming operation," nor were they conducted "in accordance with the definitions in § 323.4(a)(1)(iii)."

**A.**

Brace points out that in determining whether farming activities are established and continuing, the conduct must be analyzed by a contextual review of the total activities. *Cumberland Farms*, 647 F. Supp. at 1175. He argues that the district court correctly undertook a contextual analysis in its determination that the site was an integral part of an established and on-going farm operation, and Brace's activities between 1985 and 1987 did not bring a new area into the operation. *Brace*, slip op. at 12. The district court based its conclusion on: (1) its determination that the site is an integral part of the drainage system previously installed in adjoining crop producing fields; (2) its finding that the installation of a drainage system at the site "is normal farming activity in order to make land suitable for farming," because "[e]xtensive underground drainage systems are typical and necessary aspects of farming in Erie County," *id.* at 3; and (3) the ASCS determination that Brace had "commenced conversion" of the site from wetland to cropland prior to December 23, 1985.

The district court's reasoning and conclusion are improper. The district court misinterpreted the meaning of the "established farming operation" requirement. The district court believed it was appropriate to examine the relationship of the site in question to the rest of the land owned by the same property-owner in determining whether land was being brought into farming use. Brace maintains that it is arbitrary to delineate artificially a portion of the farm and without rational justification sever it from his overall operations. We cannot agree with this interpretation of

the statute's requirement.

The regulations provide that, "[a]ctivities which bring an *area* into farming . . . use are not part of an established operation." 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B) (emphasis added). The regulations do not specify the precise area to which we should look in determining whether there is an established farming operation. There are no minimum limits placed on the "area" being brought into farming use. Thus, we read the regulations to provide that an exemption is available only to activities that are part of an "established farming operation" *at the site*. A proper "contextual review of its total activities" only requires us to analyze whether such activities are "established and continuing" on the thirty-acre wetland site itself. *See Cumberland Farms*, 647 F. Supp. at 1175 (referring to "the site," rather than the property owner's total land holdings).[2] Our reading of the regulation recognizes the statute's legislative history and is in accord with the strict construction of the permit exemptions afforded by other Courts of Appeals. *See, e.g., Akers*, 785 F.2d at 819, 823; *United States v. Huebner*, 752 F.2d 1235, 1240-41 (7th Cir.), *cert. denied*, 474 U.S. 817, 106 S. Ct. 62 (1985); *Marsh*, 715 F.2d at 925 n.44.

Brace himself testified that: (1) for the nine-year period prior to the discharges onto the site, from 1977 to 1986, his activities at the site included no pasturing or growing of any crops, but consisted entirely of efforts to drain the wetland; (2) the site was fully covered in 1983 with indigenous plants, but that all plants had been stripped from the site in 1987, subse-

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[2] We recognize that the designation of the use of some very small sites will be effectively inseparable from the use of the surrounding land for established farming operations. Thus, we would not require that every square foot be used for farming in order for a site to meet the established operation exemption. In this case, however, it is clearly reasonable to require that all or substantially all of the thirty-acre site be part of an established operation.

quent to the discharge activities; and (3) the purpose of his 1985-1987 discharges was to drain the wetland and make it suitable for row cropping. The district court found that "*[a]s a result of* Defendants' levelling, spreading and tiling, Defendants began to grow crops on the site in 1986 and 1987." *Brace*, slip op. at 9 (emphasis added). These facts do not justify the district court's determination that Brace's activities on the site were exempt from the permit requirements as "normal farming activities." Indeed, the factual findings of the district court can only lead to the opposite conclusion. Brace converted a thirty-acre site that was not suitable for farming into a site that is suitable for farming, and thus "brought an area into farming use."

Even if Brace's father's pre-1975 use of the site for pasturing could be considered to have been a prior, "established farming operation" on the site, Brace's drainage activities demonstrate that the court erred as a matter of law in finding the exemption from the permit requirement available for his subsequent activities. Under the regulations, a farming operation is *not* "ongoing" where "modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B). Here, Brace admitted that "modifications to the hydrological regime," i.e., drainage of the site through excavating and burying four miles of plastic tubing for drainage, were necessary to grow crops on the site.

Our determination is consistent with the holdings of numerous other courts that have found the "normal farming" exemption inapplicable because modifications were required to resume farming. *See, e.g., Akers*, 785 F.2d at 819-20 ("[Defendant] argued below that unless he were allowed to complete the work he had started, the effect of which is to drain the wetland, he would be unable to engage in the farming activities he had planned. By his own admission, his activities require substantial hydrological alteration to [the site], and run afoul of the regulations."); *Bayou Marcus Livestock & Agric. Co. v. EPA*, No. 88-30275, 20 Envtl. L. Rev. (Envtl. L. Inst.) 20445, 20446 (N.D. Fla. Nov. 3, 1989) ("Before plaintiffs could have effec-

tively harvested the timber and begun farming, it was necessary to dredge, fill, construct roads and dig ditches . . . . [I]f an ongoing operation had been previously functioning, such changes in the landscape would have been unnecessary."); *United States v. Larkins*, 657 F. Supp. 76, 85-86 n.23 (W.D. Ky. 1987) ("Activities cease to be established when the property on which they were once conducted '. . . *has lain idle so long that modifications to the hydrological regime are necessary to resume operations*.' Reducing the reach of the [site] required modifications of the site's hydrological regime. Consequently, even if the wetland had a history of farm use, that use was no longer established at the time [of defendant's activities]." (emphasis by court) (citations omitted)), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016, 109 S. Ct. 1131 (1989).

Brace suggests that this line of cases is distinguishable from his circumstances because of, *inter alia*, the larger size of the farms and wetlands at issue in those cases, and the fact that one site was a habitat for an endangered species. We cannot agree. There is no provision in Section 404(f)(1) of the CWA or its implementing regulations under which either the size of a wetland or the effect of discharge activities on wildlife are factors relevant to determining whether particular discharge activities are exempt from the permit requirement. Although wetland protection is Section 404 serves the important function of protecting wildlife habitats, in addition to several other functions including flood and erosion control and water purification *see* 33 C.F.R. § 320.4(b)(2), neither the statute nor the regulations condition the permit requirement on the existence of adverse impacts on wildlife or on the particular size of a wetland. Indeed, we have upheld determinations of both civil and criminal liability for the discharge of fill material onto a 14-acre wetland site, a substantially smaller site than Brace's, where there was no claim of adverse impact on wildlife. *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993), *cert. denied*, _____ U.S. _____, 114 S. Ct 1052 (1994) (civil), and *United States v. Pozsgai*, 897 F.2d 524 (3d Cir.), *cert. denied*, 498 U.S. 812, 111 S. Ct. 48 (1990) (criminal).

In addition to the district court's erroneous interpretation of the "established farming operation" requirement, the district court erred as a matter of law in finding that Brace's installation of a drainage system at the site "is a normal farming activity in order to make land suitable for farming," because "[e]xtensive underground drainage systems are typical and necessary aspects of farming in Erie County." *Brace*, slip op. at 3. Brace argues that the court correctly considered the area-specific context in its fact finding inquiry. However, the factual determination is a legal conclusion, and is not merely a matter for factual findings. The question is not whether farmers in a particular county install extensive drainage systems. Rather, the proper question is whether the activities performed by Brace at this particular site, and at a time when the CWA applied, were within the meaning of the statutory term "normal farming activities" as defined by the regulations. Regardless of how "typical" or "necessary" such drainage systems may be in Erie County, Section 404 of the CWA requires a permit for "activities which bring an area into farming . . . use," as opposed to activities that are part of an "established farming operation." Brace did not have an "established farming operation" on the site prior to his discharges, and brought the site into farming use by discharging pollutants into waters of the United States.

Moreover, the district court erred in relying upon a determination from the ASCS in September of 1988 that Brace had "commenced conversion" of his property from wetland to cropland prior to December 23, 1985, as evidence of an "established farming operation" at the site. The USDA Swampbuster Commenced and Third-Party Determinations form signed by Brace expressly states that "[t]he granting of a commencement . . . does not remove other legal requirements that may be required under State or Federal water laws." USDA Form; App. at 173. The purpose of the "commenced conversion" determination is solely to prevent the loss of USDA benefits. The ASCS determination is not a dispositive factor in our analysis.

Moreover, to the extent that the ASCS determination has any relevance to our analysis of "normal farming activities," it

undermines such a conclusion. The very title of the determination — "commenced conversion" — indicates that Brace's discharge activities were not part of an ongoing farming operation, but rather, were directed at *converting* the wetland to the farming operation of growing crops. Even if the ASCS determination had stated that a conversion had been *completed* by December 23, 1985, the CWA permit requirement would not have been affected. Brace's activities were unpermitted and unauthorized when they occurred, and the "commenced conversion" determination provides no basis for an after-the-fact legitimization of those activities.

B.

As we explained above, the regulation governing the "normal farming activities" exemption has a second prong, under which drainage activities, in addition to being a part of an "established farming operation" as defined by the regulation, must be "in accordance with definitions in § 323.4(a)(1)(iii)." 33 C.F.R. § 323.4(a)(1)(ii). Brace's activities failed to meet the requirements of this second prong in addition to not being a part of an ongoing, established farming operation. Brace's undisputed activities: (1) excavating soil and discharging in connection with burying approximately four miles of plastic tubing for drainage; (2) levelling and clearing the formerly wooded and vegetated site; and (3) spreading dredged material, are all excluded from the activities allowed under 33 C.F.R. § 323.4(a)(1)(iii).

Brace's installation of four miles of tubing which drains the site is barred by the provision's express prohibition of both: (1) "the construction of any . . . structure which drains or otherwise significantly modifies . . . a wetland or aquatic area constituting waters of the United States"; and (2) "drainage associated with the immediate or gradual conversion of a wetland to a non-wetland . . . , or conversion from one wetland use to another." 33 C.F.R. § 323.4(a)(1)(iii)(C)(2). *See also* 40 C.F.R. § 232.2(d)(3)(D)(ii). Brace's clearing of all vegetation from the wetland site, and his spreading of dredged materials onto the

site, are barred by the provision's express prohibition of both: (1) "the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland"; and (2) "the redistribution of surface materials by blading, grading, or other means to fill in wetland areas." 33 C.F.R. § 323.4(a)(1)(iii)(D). *See also* 40 C.F.R. § 232.3(d)(4). Accordingly, by definition, Brace's discharge activities cannot constitute "normal farming activities" under the applicable regulation.

We are unpersuaded by Brace's assertion that we need not reach the definitions of 33 C.F.R. § 323.4(a)(1)(iii) because there was no conversion from one wetland use to another. Brace bases his argument on the district court's determination that Brace simply *maintained* and improved his drainage system, and continued, piece by piece, to farm land which, in one form or another, had always been used for crops or pasture. Brace asserts that spreading materials that he dredged from ditches on the site onto other portions of the site was an ordinary and normal maintenance procedure employed by local farmers. Under the CWA, a permit is not required for the discharge of dredged or fill material for the purpose of maintaining drainage ditches. 33 U.S.C. § 1344(f)(1)(C). Thus, Brace argues and the district court agreed that Brace's activities constituted maintenance of drainage ditches, an activity clearly exempt from the permit requirements of the CWA.

The exemption from the permit requirements under Section 404(f)(1)(C) for "maintenance of drainage ditches" applies to "any discharge of dredged or fill material that may result from . . . the *maintenance* (*but not construction*) of drainage ditches." 33 C.F.R. § 323.4(a)(3) (emphasis added). We find the district court erred as a matter of law in finding that Brace was simply maintaining rather than constructing the drainage ditches. Likewise, the conclusion of the district court that the activities of Brace do not require a permit because they constitute maintenance of drainage ditches, Brace, slip op. at 22, is not supported by the evidence. Brace caused the excavation of the site

and the burying of several miles of plastic tubing to facilitate drainage. It is not realistic to describe what Brace was doing as "continuing maintenance." Brace's construction of a drainage system as expressly prohibited by the regulation absent a permit. *See Huebner*, 752 F.2d at 1242 (defendants' cleaning and deepening existing ditches, excavating a new ditch, and discharging dredged materials required a permit when it brought an area of navigable waters into a use to which it was not previously subject).

Moreover, any activity that could be described as maintenance of drainage ditches was accomplished, if at all, by dredging ditches at the site. Brace's subsequent levelling at the site and spreading of the dredged material were separate, independent activities that are not subject to an exemption from the permit requirement. This subsequent spreading of dredged materials onto other portions of the site served no purpose beyond converting the thirty-acre wetland site to an upland site that could accommodate the growing of crops; it did not "result" from the maintenance of drainage ditches. There is no statutory or regulatory provision under which the spreading of the dredged materials is permissible absent a permit. The district court erred as a matter of law in holding Brace's activities permissible.

V.

As we discussed above, Brace has the burden of proving both that he qualified under Section 404(f)(1) for the normal farming activities exemption, and that the permit requirement was not "recaptured" under Section 404(f)(2) of the CWA, 33 U.S.C. § 1344(f)(2). The "recapture" provision stipulates that:

> Any discharge of dredged of fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2). The applicable regulation provides that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States." 33 C.F.R. § 323.4(c).

Initially, the district court incorrectly stated that the application of the recapture provision required the United States to establish the two elements;

First, it must be established that Brace's activities were conducted in order to bring the property into a use to which it was not previously subject. Second, if this element is established, it must then be established that Brace's activities will impair the flow or circulation of navigable waters or will reduce the reach of such waters.

*Brace*, slip op. at 21. The court's articulation of the legal standard implies that the burden of demonstrating "recapture" is on the United States. This legal standard is erroneous.

Since we have held that Brace's drainage activities on the thirty-acre wetland site are not exempt from the CWA permit requirement under the "normal farming activities" or maintenance of drainage ditches exemptions, we need not reach the application of the recapture provision. We note, however, that the district court's conclusion that the recapture provision does not apply because "[t]he land is not being converted to a use to which it was not previously subject, nor has significant impairment to reach or flow of waters been proven," *Brace*, slip op. at 22, is incorrect as a matter of law. The evidence establishes that Brace's activities drained the site to convert it from a wetland to a new, non-wetland use; the district court found that the site was inundated with water at various times in the past; the parties stipulated, and the court found, that the site constituted a wetland at the time of the discharges; Brace admitted that the purpose of installing the four miles of plastic tubing at the site in 1986 and 1987, and of clearing the vegetation from the site between 1985 and 1987, was to drain the site and make the ground ready for growing crops; and the court found that as a result of Brace's levelling, spreading and tilting, he began to

grow crops on the site in 1986 and 1987. Thus, Brace's activities fall squarely within the statutory definition of "recapture."

**VI.**

The last issue that we must address is that of Brace's penalty of violations of the permit requirements of Section 404 of the CWA and for his violations of the EPA administrative orders. Clearly, under the CWA Section 309(d), Brace is subject to a civil penalty for his violation of the CWA permit requirements. 33 U.S.C. § 1319(d) (1988).[3] Upon remand the district court must determine the appropriate amount of the penalty, based on the statutory factors delineated in Section 309(d).

The more difficult issue is whether Brace is also subject to civil penalties for his noncompliance with the EPA administrative orders. The district court found both that: (1) the EPA's administrative order had required Brace "to cease and desist all activities on the site," *Brace*, slip op. at 14; and (2) "Defendants failed to totally comply with Administrative Orders issued to them." *Brace*, slip op. at 14. However, the district court did not attach liability for violating the orders, based on its findings at "Defendants have not disturbed the soil on the site in any significant way since being served with the cease and desist orders, and in the view of this Court acted only out of sincere conviction, although undoubtedly misguided." *Id.*

Section 309(d) provides that "any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty." 33 U.S.C. § 1319(d).

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[3] Section 1319(d) provides in pertinent part:

> Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section . . . 1344 of this title by a State, . . . and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for

Section 309(d) does not afford the district court discretion to grant an exemption from liability for violating the EPA administrative orders. *See, e.g., Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990) (the language of Section 309(d) "makes clear that once a violation has been established, some form of penalty is required.") However, the record is not sufficiently clear for us to determine whether civil penalties are mandatory under the circumstances of this case. We remand this issue to the district court for further review of Brace's non-compliance with the EPA administrative orders. Thereafter, the district court must determine what, if any, civil penalties should be assessed against Brace for his violations of the EPA administrative orders.

## VII. CONCLUSION

For the foregoing reasons, the order entered December 17, 1993, granting judgment in favor of the defendants, Robert Brace and Robert Brace Farms, Inc., will be reversed. This matter will be remanded to the district court to enter judgment in favor of the United States and to assess upon further proceedings appropriate penalties for defendants' violations of the permit requirements, and to assess what, if any, penalties are appropriate for violations of the EPA administrative orders.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*

*for the Third Circuit*

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each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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No. 94-3076

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**UNITED STATES OF AMERICA,**
**Appellant**

v.

**ROBERT BRACE;**
**ROBERT BRACE FARMS,**
**a Pennsylvania Corporation**

---

**SUR PETITION FOR REHEARING**

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BEFORE: SLOVITER, Chief Judge; BECKER, STAPLETON, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE and SAROKIN Circuit Judges; and POLLAK*, District Judge

The petition for rehearing filed by appellees having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: January 9, 1995

## RELEVANT STATUTORY AND REGULATORY PROVISIONS

33 U.S.C. § 1311(a) provides:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1344(a) provides in relevant part:

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(f) provides in relevant part:

> (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material —
>
> (a) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> * * *
>
> is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this Act[.]
>
> (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 C.F.R. § 323.4 provides in relevant part:

> (a) General. Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:
>
> (1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.
>
> (ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been coverted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

Supreme Court, U.S.
FILED
MAY 31 1995
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No. 94-1669

In the
**Supreme Court of the United States**
October Term, 1994

ROBERT BRACE and ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,
*Petitioners*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

# BRIEF OF AMICI CURIAE PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION, AND CATL FUND IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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No. 94-1669

In the
Supreme Court of the United States
October Term, 1994

ROBERT BRACE and ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,
*Petitioners*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

# BRIEF OF AMICI CURIAE PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION, AND CATL FUND IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

## IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself and California Farm Bureau Federation, California Cattlemen's Association, National Cattlemen's Association, and the CATL Fund (Pacific Legal Foundation, *et al.*) in support of the petition for writ of certiorari. Written consent to the filing of this brief has been

granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating matters affecting the public interest. PLF has nearly 25,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. PLF's policy is set by a Board of Trustees comprised of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. It has authorized the filing of this brief.

California Farm Bureau Federation (CFBF) is a nonprofit, voluntary membership corporation organized under the laws of the State of California for the purpose of advancing agriculture and working to resolve the problems facing the agricultural community in California. Its members are 53 county farm bureaus, through which it represents more than 70,000 member families in 56 California counties and more than 80% of the commercial farmers in California. CFBF is the state's largest general farm organization.

California Cattlemen's Association (CCA), a nonprofit corporation founded in 1917, represents the state's beef cattle industry in legislative and regulatory affairs. CCA has a membership base of approximately 3,200 ranchers and feedlot operators who operate on nearly 40 million acres of private and public land throughout the state. Beef cattle producers contributed $1.5 billion to the state's $19.7 billion agricultural economy in 1993, and the industry provides more than 26,000 jobs from the ranch level to the processing level in the State of California.

National Cattlemen's Association (NCA) is a nonprofit trade association that represents over 230,000 cattlemen and other persons from all segments of the beef cattle industry. Affiliated with 46 state cattle associations and 29 national

beef breed organizations, it acts as the national spokesperson and issues manager for all segments of the United States beef cattle industry. NCA is an advocate for advancing the economic, political, and social interests of the United States cattle industry. It works to create a positive business environment and to maintain the land from which its members make their living while assuring customers a safe, affordable, and wholesome beef product.

The CATL Fund was created by NCA to assist landowners and others similarly situated, including cattlemen, in establishing broad-based legal precedent to protect property rights, promote free enterprise, and minimize regulatory abuses.

## IMPLICATIONS OF THE CIRCUIT COURT'S DECISION

This case presents a very important issue in need of resolution. Farmers and ranchers, including those represented by Pacific Legal Foundation, *et al.*, are greatly in need of an interpretation of the exemption for farming activities in Clean Water Act § 404(f)(1) which accords with Congress' original intent. The lower federal courts, the United States Environmental Protection Agency (EPA), and the Army Corps of Engineers (Corps) have interpreted the exemption in such a narrow and crabbed fashion that normal farming activities can now require a dredge and fill permit under Section 404 which if not obtained can even subject farmers and ranchers to civil and criminal liability under the Clean Water Act.

Numerous farms and ranches have fields now planted in pasture which were often formerly planted in hay or row crops. Farm or ranch families and their lenders have always treated those pastures as part of an integrated agricultural operation which could be managed into or out of pasture, hay, or row crops according to the demands of market forces. The loss of management flexibility over such lands impairs the economic vitality of those farms and ranches both by limiting farmers' and ranchers' ability to use them in

response to market forces and by decreasing their value as collateral for necessary financing.

Of paramount concern to California are other serious problems which the Third Circuit's decision in this case presents. California agriculture is facing tremendous pressures, both from the environmental community and from the state's growing urban populations, to use its water resources more efficiently by either converting pasture to higher yield crops which consume less water, or by leveling and changing water distribution on lands retained in pasture. Most pasture in California is irrigated, although some subirrigated pasture, *i.e.*, "natural" wetlands, and seasonally dry, nonirrigated pasture exists.[1] Thus far, the industry's water conservation efforts have yielded dramatic results: agriculture has not increased its share of the state water budget in 20 years, even as it has increased its productivity by 50%.

However, the withdrawal of pasture lands from the shield of the "normal farming activities" exemption under Section 404(f)(1) will not only impair the economic viability of individual farms and ranches, but will also threaten the future of California agriculture by interfering with the agricultural water conservation programs now underway in the state.

The plight of one farming family, out of many similarly affected, provides a dramatic example of the misconstruction of the farming exemption and its consequences. In 1989, Fred and Nancy Cline bought the old Poppe ranch in

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[1] The distinction between "natural" wetlands pasture and irrigated wetlands pasture is immaterial to the issues before the Court in this case because the Army Corps of Engineers has taken the position that artificial wetlands fall within the reach of its dredge and fill regulation. The Ninth Circuit has supported this position. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990).

southern Sonoma County, California, and planned to operate a small winery, grow grapes, and raise cattle on it. Although the eastern portion of the ranch adjacent to Sonoma Creek was subject to flooding during winter, and as such was wetlands, those wetlands had been converted to agricultural use for pasture, planting hay, and growing oats since the mid-1880s. As such, they are previously converted wetlands exempt from the requirement of a Section 404 dredge and fill permit for farming. Consequently, Mr. Cline continued the land's agricultural use, including discing and improving its soil, extending some ditches, repairing one tidal gate and adding another and leveling some areas to make them more useful for grape growing.

The Army Corps of Engineers did not approve of Mr. Cline's continued farming however. Despite extensive evidence that the farming and grazing had continually occurred on the farm's wetlands for many years, the Corps' personnel argued that the land was not farmable and had reverted to its preagricultural wetlands condition. The Corps further argued that Mr. Cline's plowing and planting of oats and rye on the wetlands was a "new use" notwithstanding the fact the land had been planted in crops on numerous occasions previously. The Corps' position if upheld will subject the farm land to Section 404 permitting requirements and Mr. Cline to civil or criminal penalties.

Mr. Cline's improvement of soil and drainage and his alternating use of farmland from grazing to growing row crops is a normal farming activity which regularly occurs in California and throughout the country. Yet under the Corps' interpretation of Section 404(f) the normal farming activity should nevertheless be regulated and possibly prohibited.

Add to the Clines a lengthy list of farmers across this Nation who have been similarly affected by the misconstruction of Section 404(f)(1) and it becomes clear that the need to review this instant case is compelling. Due to the importance of this issue for farmers and ranchers nationwide, amici Pacific Legal Foundation, *et al.*, provide

this amicus curiae brief in support of the petition for writ of certiorari.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. at 19a-41a) is reported at 41 F.3d 117 (3d Cir. 1994).[2] The opinion of the District Court (App. at 1a-18a (Adjud.)) is unreported.

## STATEMENT OF THE CASE

Congress enacted the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.* (Clean Water Act or CWA), to control and abate water pollution, not to regulate farming. Section 301(a) of that statute prohibits the discharge of any pollutant into navigable waters of the United States, except pursuant to a permit. 33 U.S.C. § 1311(a). Section 404 of the CWA authorizes the Secretary of the Army, through the Corps, to issue such permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) and (d). Those provisions impact American farmers only because the EPA and the Corps have defined the term "waters of the United States" to include "wetlands." 33 C.F.R. § 328.3(b); 40 C.F.R. § 232.2(r).[3]

Congress specifically intended that farmers not be subjected to regulation of their day-to-day decisions on the

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This brief shall cite to the Appendix to the Petition as "App. at __."

[3] In this case, Brace stipulated that the 30-acre site (Site) at issue falls within the definition of "wetlands" set out at 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2(r).

basis of such wetland provisions. Rather, in Section 404(f)(1) of the CWA, Congress specified that those provisions would apply only to attempts to convert non-farming uses into farming uses. Thus, no permit is required to discharge dredged or fill material resulting from "normal farming" activities.[4] Congress did provide one limitation to the "normal farming" exception, in a "recapture provision." Section 404(f)(2) of the CWA provides that notwithstanding the exemptions set out in Section 404(f)(1), a permit shall be required for any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced. 33 U.S.C. § 1344(f)(2). Thus, Section 404(f) exempts "normal farming" activities from the permitting process under the CWA unless the activity both brings a wetlands area into "a use to which it was not

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[4] (1) [T]he discharge of dredged or fill material --

(A) [for] normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices ....

....

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches . . . is not prohibited by or otherwise subject to regulation under this section . . . .

33 U.S.C. § 1344(f)(1)(A).

previously subject" *and* impedes the flow of navigable waters.

The Corps and EPA have adopted regulations that restrict the "normal farming" exemption by requiring that any such activity

> must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii) .... Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

33 C.F.R. § 323.4(a)(1)(ii).

As set out more fully in the Petition for Writ of Certiorari (the Petition), Robert Brace (Brace) farms approximately 600 acres of farmland in Erie County, Pennsylvania, including his family's 140-acre homestead farm, which Brace bought from his father in 1975. Brace's family has farmed that land without interruption since the 1930s. This case arises from Brace's rehabilitation of a drainage system on the homestead farm, including the 30-acre wetlands Site contained within that farm.

Before Brace purchased the homestead farm, his family had used that property, including the Site, to pasture cows and horses. In 1976, Brace decided to improve the farm by updating and expanding the existing drainage system, parts of which had fallen into disrepair. Upon review of the system the Agricultural Stabilization and Conservation Service, of the United States Department of Agriculture (ASCS), recommended reopening the drainage channel from the Site in order to permit the water to flow in its natural direction. Adjud. at 6.

In late 1976, Brace began implementing that plan. *Id.* at 6. From that date forward Brace worked continuously on the drainage system of the homestead farm, but due to limitations on availability of money, time, and equipment he did not complete the entire plan until 1987. *Id.* at 8. By 1986, however, Brace had completed his work on the drainage system and began planting rye, oats, and hay on part of the Site.

In 1987, EPA and the Corps issued administrative orders commanding Brace to cease and desist all discharge activities on the homestead farm. He was required to plug all main drainage tiles servicing the entire homestead farm and restore these areas of the farm now declared to be federally regulated wetlands to their "natural state." On October 4, 1990, the United States initiated the present litigation.

The District Court found for Brace, including that all of Brace's activities in rehabilitating the drainage system on the homestead farm were "normal farming," in the sense that they were activities conducted regularly by farmers in Western Pennsylvania, and Erie County in particular. The District Court also ruled that the CWA's recapture provisions do not apply because Brace did not subject the Site to any new use, and that he did not change the reach, or impede the flow, of navigable waters of the United States. *Id.* at 10a-11a.

The United States Court of Appeals for the Third Circuit reversed. That court dismissed the District Court's reference to the regular practices of Erie County farmers and reversed the District Court's factual finding that Brace's activities constituted "normal agricultural activity." App. at 29a-38a. The Court of Appeals also decided that Brace fell within the recapture provision by altering the use of the Site from pasture land to crop land, which, in the Court of Appeals' view was "a new, non-wetland use." App. at 39a.

Accordingly, Brace was held liable for violating the wetlands regulatory scheme.

## SUMMARY OF ARGUMENT

This Court should grant certiorari to review the decision of the United States Court of Appeals for the Third Circuit for two reasons. One reason is the importance to the nation's farmers and ranchers of a proper interpretation of the exemption to Section 404's dredge and fill permit requirement for normal farming. Farmers and ranchers depend on the existence of the exemption to be able to adequately manage and improve their operations in response to the demands of market forces and the need to conserve resources. Congress enacted the exemption to free farmers and ranchers from the burdens of dredge and fill permits and from potential liability under the CWA for engaging in their livelihood on wetlands previously converted to agricultural use. Resolution of the meaning and applicability of the Section 404(f)(1) exemption will benefit each farmer or rancher in the United States who has wetlands subject to agricultural use.

The second reason is that this Court needs to definitively vindicate Congress' intent in enacting the Section 404(f)(1) exemption. Until now, the EPA and the Corps, along with a number of federal courts which have visited the matter, have given the exemption a crabbed and unduly narrow interpretation which has vitiated the exemption's usefulness to farmers and ranchers. This misinterpretation arises from the assumption, sometimes expressed and sometimes not, that the Clean Water Act should forbid any impairment of the quality and extent of wetlands under all circumstances. Although this assumption is false, it has provided the rationale for decisions such as the one which the Court of Appeals rendered in this case. That decision introduces farmers and ranchers across the United States to

new uncertainty and so narrows the exemption for normal farming as to deprive it of any significance.

By granting certiorari, this Court can provide all farmers and ranchers with the certainty that, under normal circumstances, they can use wetlands previously converted to agricultural purposes without obtaining a permit from the Corps and without the fear of criminal and civil liability under the Clean Water Act. This Court can make clear that "normal farming activities" are not limited to growing only a particular row crop, but include other agricultural pursuits, such as pasturing livestock and rotating crops, which farmers have undertaken for thousands of years. This Court can also confirm that the recapture provision of the CWA, Section 404(f)(2), means what it says: farmers fall within the terms of that provision, and thus come within the ambit of federal wetlands regulation, only if they both change the use of land from some other use to a farming use, *and* that change in use reduces the reach of navigable waters.

## REASONS FOR GRANTING THE WRIT

### I

### THIS CASE PRESENTS A QUESTION OF INTERPRETATION OF FEDERAL LAW WHICH IS OF GREAT IMPORTANCE TO THE NATION'S FARMERS AND REQUIRES THIS COURT'S DEFINITIVE RESOLUTION

The Court of Appeals' decision endangers the ability of American farmers and ranchers to rely on the exemptions that Congress enacted to shield them from the massive burdens of obtaining prior permission from the EPA and Corps under the Clean Water Act every time they move soil on their previously farmed wetlands. The statement of the identity and interest of amici curiae above demonstrated the importance of the Section 404(f)(1) exemption to farmers and ranchers.

By deciding this case, this Court can make clear that: (1) growing crops and pasturing livestock are both well within the scope of "normal farming" activities, and farmers and ranchers can rotate crops or switch from growing crops to pasturing livestock as part of "normal farming"; and (2) the recapture provision of Section 404(f)(2) of the CWA does not come into play where a farmer merely alters the mix of agricultural uses of his land. Rather it applies where landowners categorically change the use of their land, such as from a farm to a residential development, or build an industrial establishment on raw land. Without this Court's intervention, federal wetlands regulation will continue to impose huge burdens and uncertainties on the farmers and ranchers of the United States, an occurrence never intended by Congress.

## II

## THE COURT OF APPEALS WRONGLY DECIDED THIS CASE IN A MANNER TYPICAL OF THE CONTINUING MISINTERPRETATION OF THE CLEAN WATER ACT BY FEDERAL ADMINISTRATIVE AGENCIES AND MANY FEDERAL COURTS

### A. Brace's Activities, Typical of Many of the Nation's Farmers, Constitute "Normal Farming Activities"

The Court of Appeals overturned the District Court's determination that Brace's activities were "normal farming," apparently on the basis that his work on the drainage system cannot, as a matter of law, have been normal farming.[5] The

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[5] The Third Circuit declared that "[r]egardless of how 'typical' or 'necessary' such activities are in Erie County, (continued...)

Court also stated that, through his work on the drainage system, "Brace converted a thirty-acre site that was not suitable for farming into a site that is suitable for farming, and thus 'brought an area into farming use.'" App. at 33a. Because the Site was used for pasturing cows and horses for half a century before the Court of Appeals' decision, the Court can only have reached that conclusion by deciding that pasturing livestock is not "normal farming."

Such a position has no basis and creates a huge threat to farmers and ranchers throughout the United States. The livelihood of millions of American farmers and ranchers depends on draining water from fields and grazing livestock. This Court should not permit the Court of Appeals to limit "normal farming" to growing row crops only, and thus undercut the "normal farming" exception to the CWA.

There is no need for the Court of Appeals' overly restrictive interpretation. Section 404(f) of the CWA requires no such reading: it merely exempts "normal farming" from the permit requirement and lists several nonexhaustive examples of such normal farming, including "plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices ...." The legislative history of the CWA shows that Congress specifically envisioned that drainage would be included in "normal farming" activities. "[T]he drainage exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poor drained farm or forest land, of which millions of acres exist. No permits are required for such drainage. Permits are required only where ditches or channels are dredged in a

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[5] (...continued)
Pennsylvania, they were not "normal farming activities." App. at 35a.

swamp, marsh, bog, or other truly aquatic area." *4 A Legislative History of the Clean Water Act of 1977* (*Legislative History*) at 1042 (Senate Debate of August 4, 1977, Statement of Sen. Muskie).[6] Even the Corps' regulations do not require such a drastic result.[7] There is no reason that drainage of continuously farmed and grazed land

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[6] During the 1977 debates on amendments to the Clean Water Act, Senator Bentsen stated: "I find it offensive that before a small farmer can dig new irrigation ditches he must first write the U.S. Army for permission, complete the necessary Federal forms, and then wait an average of 125 days while his request is shuffled from one bureaucrat's in-box to another. I also find it offensive that a farmer who has paid hard-earned money for new land 2 years ago may now be prohibited by the Government from improving that land for agriculturally productive uses, and will not receive a penny in just compensation for his loss of income from the property." *Legislative History* at 905. Senator Hart replied that the exemption "does exempt activities which are normal farming or agricultural activities, run by individuals or family farmers." *Id.* at 907-08. Senator Hart went so far as to state that "[e]very proposal before the Senate, every one, is designed to exempt those normal activities from that kind of overregulation by the Corps of Engineers or anybody else. Any argument that is made on the floor to the contrary simply misrepresents one or the other of the proposals upon which we will be asked to vote before this debate is over." *Id.* at 928.

[7] However, the regulation, 33 C.F.R. § 324(a)(1)(ii), goes well beyond the CWA's own provision on the subject. The statute exempts all "normal farming" from the permitting process, and does not limit the exemption to prior or existing agricultural uses. *See* 33 U.S.C. § 1344(f)(1).

is anything other than "normal farming" under these provisions.

In the decades preceding the government's decision to bring this case, Brace and his family did three things with the homestead farm: they pastured farm animals there, refurbished the drainage system to grow row crops, and, finally, began growing oats, alfalfa and hay on that land. All three activities are what Congress enacted Section 404(f) to protect. *See Legislative History* at 869 ("family business or family farming activity need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters").

**B. Brace's Activities Did Not Fall Within the Recapture Provisions of 33 U.S.C. § 1344(f)(2)**

The District Court concluded not only that Brace's activities were protected by the "normal farming" exemption, but also that Brace did not fall within the "recapture" provision of Section 404(f)(2) of the CWA, 33 U.S.C. § 1344(f)(2). Under that provision, the exemptions in Section 404(f)(1) are overridden for any discharge of fill into wetlands "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2).

The language of Section 404(f)(2) requires two elements to be satisfied before the recapture becomes effective: (1) that the activity be intended to bring an area into "a use to which it was not previously subject"; and (2) that the activity impair the reach or flow of the navigable waters of the United States. The District Court found that neither element was present in this case. Adjud. at 14. By installing a drainage system throughout the homestead farm, including the Site, Brace did not introduce any new "use" to

the Site. He merely changed the manner in which he used the Site as part of his farm. He did not introduce any new or foreign fill to the Site but simply relocated soil cleaned out of the drainage ditches on the same land. Adjud. at 23. Finally, Brace's rehabilitation of the drainage system did not impair the reach or flow of the waters of the United States. Rather, his work merely improved the flow of water in its natural channels and directions. As the Site is dry except for times of excessive precipitation, water continues to reach everywhere that it did before Brace's rehabilitation work. Adjud. at 11a.

The Court of Appeals incorrectly concluded, however, that Brace fell under the recapture provision of Section 404(f)(2) by relying on the Corps' regulation interpreting Section 404(f)(2). That regulation provides that "[a] conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." 33 C.F.R. § 323.4(c). The Corps' regulation confuses an area's fulfillment of the technical definition of "wetland" with its use. There is no necessary correlation between the two. Both wetland and nonwetland areas are used for farming purposes in the United States and, changing from one crop to another, or changing an area from pasturage to cropland, is a normal farming activity, not a new use. Congress certainly never intended to require farmers to seek the federal government's permission to change crop patterns, or refurbish a drainage ditch.

Statutory interpretation is ultimately the responsibility of this Court. *Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 118 (1978); *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). Courts are also the primary interpreters of regulations. *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123, 131 (9th Cir. 1980) ("Agency regulations must be consistent with and in furtherance of the purposes and policies embodied in the congressional statutes which authorize them."). Although an

agency's interpretation of its governing statute is generally entitled to deference in the absence of any clear expression of congressional intent, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), that deference "is not to be applied to alter the clearly expressed intent of Congress. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986). *See also Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973) ("[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate."). In particular, deference to administrative agencies "'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983) (quoting *American Ship Building Co. v. National Labor Relations Board*, 380 U.S. 300, 318 (1965)).

Under the standard this Court has established, the Corps' regulation implementing the recapture provision of Section 404(f)(2) exceeds its statutory mandate and is thus invalid. Nothing in the CWA suggests that Congress authorized the EPA or Corps to outlaw every conversion of wetlands to nonwetlands. Indeed CWA doesn't even prohibit "draining" a wetland--only "discharging a pollutent" into one. *See Save Our Community v. United States Environmental Protection Agency*, 971 F.2d 1155, 1164-65 (5th Cir. 1992). Congress' intent to exclude agricultural uses from regulation under the CWA is beyond question. *See* 33 U.S.C. § 404(f)(1), (2). Where, as in this case, the wetlands at issue at all times were used for agricultural purposes, the Corps cannot use its own fiat to exclude a farmer from an exemption to which he is entitled by statute.

Furthermore, none of the prior decisions on which the Court of Appeals relied provides precedent for the Court's radical expansion of the regulatory threat to America's farmers and ranchers. Virtually every prior case that has applied the recapture provision of Section 404(f)(2) has done so in circumstances where the landowner had undertaken a truly new use for the property at issue, or at least revived a use that had not been undertaken in decades. *See Conant v. United States*, 786 F.2d 1008, 1010 (11th Cir. 1986) (new fish farm was not part of any established farming operation); *United States v. Huebner*, 752 F.2d 1235, 1242 (7th Cir. 1985) (wetlands had not been farmed in at least 20 years); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (wetlands had not been farmed before); *Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344, 1347 (E.D. N.C. 1992) (no indication that original swamp had ever been farmed before); *Bayou Marcus Livestock & Agricultural Co. v. United States Environmental Protection Agency*, No. 88-30275, 1989 WL 206151 (N.D. Fla. Nov. 3, 1989) (wetlands not previously farmed); *United States v. Larkins*, 657 F. Supp. 76, 79, 85 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1989) (land had not been farmed since at least 1950). Unlike this action, each of those cases presented a combination of truly new land uses and impairment of water flow that is exactly what Section 404(f)(2) was intended to prevent.[8]

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[8] *United States v. Akers*, 785 F.2d 814 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986), is distinguishable from the present case. There, a farmer drained nearly 3,000 acres of wetlands, known as the "Big Swamp," and built a dike more than two miles long. The Ninth Circuit found the sheer scope of the draining to be significant: "[T]he substantiality of the impact on the wetland . . . must be considered in

(continued...)

## CONCLUSION

If farmers and ranchers are subject to regulatory oversight every time they alter the mix of activities on their lands, they will not be able to manage their properties effectively, and will be exposed to the constant and paralyzing risk of bureaucratic intervention. Congress never intended to create this situation, nor did it even intend to regulate farming at all. Rather, it sought to prevent the conversion of nonfarm wetlands into agricultural or industrial uses, and to prevent the filling of wetlands by nonfarm developers or industrial concerns. By specifically exempting agriculture, Congress maintained a policy begun by the founders of the United States, keep the federal government out of regulating the day-to-day activities of agriculture. *See, e.g., The Federalist No. 17,* at 118 (A. Hamilton) (Clinton Rossiter ed. 1961). *See also United States v. Lopez*, 63 U.S.L.W. 4343, 4355 (1995) (Thomas, J., concurring).

By eviscerating the statutory exemption for "normal farming," the Court of Appeals for the Third Circuit has destroyed a balance that Congress carefully set. This Court

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[8] (...continued)
evaluating the reach of [33 U.S.C. § 1344(f)(2)]." 785 F.2d at 822. Although the Third Circuit dismissed the importance of this factor (App. at 34a-35a), that view does not comport with Congress' intent. *See Legislative History of the Water Pollution Act Amendments of 1972* (1973) at 474 (Senate Debate, Dec. 15, 1977).

should grant certiorari in this case, reverse the decision of the Court of Appeals, and supply the definitive interpretation of the farming exemption in Section 404(f) of the Clean Water Act.

DATED: May, 1995.

Respectfully submitted,

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In the
**SUPREME COURT OF THE UNITED STATES**
October Term, 1994

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ROBERT BRACE AND ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,
*Petitioners,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

---

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

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# BRIEF OF THE ADIRONDACK BLUELINE CONFEDERATION, ADIRONDACK SOLIDARITY ALLIANCE, ALLEGHENY HARDWOOD UTILIZATION GROUP, ALLIANCE FOR AMERICA, AMERICAN ENVIRONMENTAL FOUNDATION, AS *AMICI CURIAE** IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF
AMERICAN HOMEOWNERS FOUNDATION,
AMERICANS FOR TAX REFORM,
CITIZENS AGAINST REPRESSIVE ZONING,
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS,
CITIZENS FOR PRIVATE PROPERTY RIGHTS,
CITIZENS FOR RESPONSIBLE ZONING AND
LANDOWNER RIGHTS, INC.,
GORGE RESOURCE COALITION,
HARDWOOD LUMBER MANUFACTURING ASSOCIATION
OF PENNSYLVANIA,
HILL COUNTRY LANDOWNERS ASSOCIATION,
ILLINOIS AGRI-WOMEN,
MAINE RIGHTS LEGAL FOUNDATION,
MOBILE COUNTY LANDOWNERS ASSOCIATION,
MOLALLA TIMBER ACTION COMMITTEE,
NEW HAMPSHIRE LANDOWNERS ASSOCIATION,
OREGONIANS IN ACTION LEGAL CENTER,
PENNSYLVANIA AGGREGATES AND
CONCRETE ASSOCIATION,
PENNSYLVANIA ASSOCIATION OF REALTORS,
PENNSYLVANIA COAL ASSOCIATION,
PENNSYLVANIA INDEPENDENT PETROLEUM PRODUCERS,
PENNSYLVANIA LANDOWNERS' ASSOCIATION,
PENNSYLVANIA MINING PROFESSIONALS,
PEOPLE FOR THE WEST! ACCORD CHAPTER,
PUTTING PEOPLE FIRST,
RIVERSIDE AND LANDOWNERS PROTECTION
COALITION, INC.,
RURAL LANDOWNERS MUTUAL ASSISTANCE
ASSOCIATION,
STOP TAKING OUR PROPERTY,
UNIFIED SPORTSMEN OF PENNSYLVANIA,
WESTERN MINING COUNCIL,
WESTERN TRADITIONS COALITION,
WINNING AMERICA'S RIGHTS, and
DEFENDERS OF PROPERTY RIGHTS.

## QUESTIONS PRESENTED

I. Whether the "normal farming activity" exemption under Section 404(f) of the Clean Water Act must be construed in a manner consistent with the Fifth Amendment mandate that private property be protected?

II. Whether the Fifth Amendment requires government to compensate a property owner where government actions frustrate reasonable investment-backed expectations?

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DEFENDERS OF PROPERTY RIGHTS.
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

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## IDENTITIES AND INTERESTS OF *AMICI CURIAE*

**Adirondack Blueline Confederation** (Gloversville, NY) is a citizens' group working for the preservation of property rights, especially in the Adirondack Park of New York.
**Adirondack Solidarity Alliance** (Crown Point, NY) was created to respond to state legislation that would further regulate private property in the Adirondack region. Its four chapters educate the community about the importance of property rights, and offer assistance to residents who are having trouble complying with the Adirondack Planning Act.
**Allegheny Hardwood Utilization Group, Inc.** (Kane, PA) is a coalition of loggers, foresters, sawmills, related forest industries, allied organizations, businesses, and government agencies working together to educate and inform individuals in the promotion of the forestry industry within Pennsylvania. AHUG initiates and supports programs, discussion, and legislation to protect the hardwoods industry.
**Alliance for America** (Gloversville, NY) is a fifty-state network of over 500 independent, grassroots property rights organizations whose collective membership represents millions of individual property owners across the country. Alliance groups cover the full spectrum of property rights interests including farming, grazing, forestry, fishing, mining, recreation, energy, and animal welfare.
**American Environmental Foundation, Inc.** (Navarre, FL) believes that the environment can be protected without compromising constitutional protections of property rights. AEF's founder Ocie Mills and his son were imprisoned for twenty-one months for allegedly disturbing a wetland. A federal judge later ruled that the parcel of dry land may have been improperly designated as a wetland.

**American Homeowners Foundation** (Arlington, VA) is an education and research organization serving the nation's sixty-five million homeowners and millions of future homeowners. AHF is dedicated to making home ownership possible for non-owners, helping homeowners in need, protecting home values and ownership tax incentives, and helping home purchasers make informed decisions.

**American Loggers Solidarity** (Forks, WA) is a broad-based organization comprised of individuals, small businesses, corporations, and elected officials at the city, county, and state levels in seven states. ALS believes that the sanctity of individual rights as provided in the United States Constitution must be protected by elected officials, bureaucracies, and the judicial system.

**Americans for Tax Reform** (Washington, DC) is a coalition of individuals, taxpayer groups, and businesses dedicated to the principle of a limited government. They are concerned with federal tax policy and oppose increased taxation.

**Citizens Against Repressive Zoning** (Haslett, MI) works to curb abuses of zoning practices in counties, cities, villages, towns, townships, and parishes.

**Citizens for Constitutional Property Rights, Inc.** (Crestview, FL) is a statewide organization purposed to secure private property guarantees provided in the Bill of Rights. CCPR engages in public advocacy projects that foster an awareness of governmental programs that violate the United States Constitution by eroding private property rights.

**Citizens for Private Property Rights, Inc.** (Sullivan, MO) is a nonprofit, grassroots organization dedicated to the defense and preservation of property rights and constitutional rights in general.

**Citizens for Responsible Zoning and Landowner Rights, Inc.** (Maiden Rock, WI) is comprised of farmers, landowners and businesspeople. The organization provides a forum to educate and inform the government of its responsibility to protect both the environment and the constitutional rights of its citizens.

**Environmental Conservation Organization** (Hollow Rock, TN) is a national organization of landowners and landowner associations working to balance environmental protection with economic vitality. Its membership includes individuals, businesses, and over 600 local, regional, state, and national organizations that work at the grassroots level.

**Gorge Resource Coalition** (Odell, OR) is a coalition of over 100 organizations. Primarily concerned with regulations affecting the Columbia River Gorge area, it is active at the local, state, and national levels to support private property rights, environmental stewardship, and less regulation.

**Hardwood Lumber Manufacturing Association of Pennsylvania** (Lebanon, PA) is committed to ensuring the viability of the timber resource and timber and forest products industry of Pennsylvania in the interest of achieving a healthy environment, sustainable forest base, and strong economy.

**Hill Country Landowners Association** (Georgetown, TX) was formed in response to plans to designate a 30,000-acre endangered species habitat in the State of Texas. The Coalition opposes enlarging of the authority of unelected officials because they are not subject to voter approval and their decisions can be remedied only through litigation.

**Illinois Agri-Women** (LaMoille, IL) is an organization of farm and agri-businesswomen promoting a better understanding of agriculture and the family farm system. They promote agriculture for the benefit of the American people.

**Maine Rights Legal Foundation** (Lubec, ME) engages in litigation in support of the broad public interest of the citizens of Maine and across the nation in the support of the continuation of private property rights as guaranteed under the United States and Maine Constitutions.

**Mobile County Landowners Association** (Mobile, AL) is a volunteer-staffed organization representing the interests of private property owners in the county on issues ranging from local zoning to the Endangered Species Act. Members attend county commission meetings, monitor state legislation, and maintain ties with national property rights organizations.

**Molalla Timber Action Committee** (Molalla, OR) was organized to counter efforts to halt natural resource production on federal lands. MTAC believes that forests can be managed without destroying the ecosystem or the economy.

**New Hampshire Landowners Association** (Campton, NH) is a statewide organization founded to foster the conservation of natural resources in a manner consistent with constitutionally-guaranteed property rights. NHLA participates in legal action that affects the direct interest of its approximately 2,000 members or that broadly affects public policy.

**Oregonians In Action Legal Center** (Tigard, OR) is a nonpartisan, nonprofit public interest organization involved in litigation to protect the constitutional rights of landowners and counter excessive uses of regulation. OIA-LC successfully represented the plaintiff in the United States Supreme Court case of *Dolan v. Tigard*, 114 S. Ct. 2309 (1994).

**Pennsylvania Aggregates and Concrete Association** (Harrisburg, PA) is a trade association with over 250 member companies. PACA represents the sand, gravel, quarry, cement, slag ready-mix and concrete industries in the state.

**Pennsylvania Association of REALTORS** (Harrisburg, PA) is a nonprofit association representing over 25,000 members. The vast majority of its members are licensed independent real estate brokers and salespeople. One of the association's objectives is to protect the right to own and use private property.

**Pennsylvania Coal Association** (Harrisburg, PA) represents forty-six major producers of bituminous coal and nearly 100 companies in allied industries. The primary goals of the PCA are to offer common sense alternatives to legislative and regulatory decisions that affect coal operations and to communicate the continuing value of the coal industry.

**Pennsylvania Independent Petroleum Producers Association, Inc.** (Seneca, PA) is a nonprofit corporation founded to influence current and future oil and gas regulation within Pennsylvania that erodes property rights.

**Pennsylvania Landowners' Association** (Waterford, PA) was formed to educate property owners about the threat to their property rights and personal freedom posed by increasingly intrusive regulations on land use, to generate public debate, and to develop and implement a strategy to restore reason and balance in environmental regulation.

**Pennsylvania Mining Professionals** (Harrisburg, PA) is a commonwealth-wide group of engineers, surveyors, chemists, hydrogeologists, biologists, chemists, soil scientists, and technicians dedicated to applying science and technology to resource recovery and environmental protection.

**People for the West! ACCORD Chapter** (Phoenix, AZ) is a grassroots organization created to support western communities against overreaching government. Its membership believes that people who own and depend on the land make the best stewards of the environment and that mankind has the ability to solve environmental problems through scientific means.

**Putting People First** (Helena, MT) is a nonprofit organization of citizens who believe in Western Civilization and support a return to common sense in man's relationship with nature and to his fellow man; and believe that public policy should be based on science and rationality.

**Riverside and Landowners Protection Coalition, Inc.** (Boerne, TX) represents Texas citizens who own and operate ranches and farms. The Coalition is committed to educating the general public about the importance of respecting constitutional guarantees of the right to own and make reasonable use of private property. They also work with Texas legislators and state agencies to further protect these rights.

**Rural Landowners Mutual Assistance Association** (Davisville, MO) is an organization of landowners in the Missouri Ozarks region who are opposed to the intrusion of federal and state agencies on their constitutional property rights through the application of rules and regulations.

**Stop Taking Our Property** (Chesterton, IN) is comprised of 300 farm families who live along the Salt Creek and Little Calumet Rivers in Porter County, Indiana. These families have been adversely affected for years by applications of Section 404 of the Clean Water Act. Members of STOP believe that government should be bound by constitutional protections of private property when it regulates land use.

**Unified Sportsmen of Pennsylvania** (Harrisburg, PA) is a statewide, grassroots organization dedicated to the promotion of safe and sensible hunting, fishing, trapping, and shooting sports. It is active in state government and supports a balanced approach to wildlife management taking both the needs of animals and humans into consideration.

**Western Mining Council** (Los Angeles, CA) seeks to protect the property interests and constitutional rights of small business miners. WMC strongly supports reversing the trend of government taking private property without just compensation.

**Western Traditions Coalition** (Denver, CO) is dedicated to preserving the rights and heritage of citizens who believe in the wise use of animals for human benefit. WTC endorses the philosophy of ownership and protection of private propert, and that the multiple use of private lands provides a balanced economic and ecologic benefit for everyone.

**Winning America's Rights** (Reno, NV) is an umbrella organization that acts as a sounding board for issues and ideas affecting federal legislation. The goal of the organization is to raise public awareness of issues like property rights, overregulation, and unfunded federal mandates.

**Defenders of Property Rights** (Washington, DC) is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Its mission is to protect rights considered essential by the framers of the United States Constitution and to promote a better understanding of the integral relationship between private property rights and individual rights and liberties. Defenders engages in litigation across the nation affecting the public interest and the private property rights of its membership. Defenders has devoted a significant portion of its resources to the issue of regulatory takings and has participated in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, No. 94-859 (U.S. argued April 17, 1995) when these cases were before this Court.

## SUMMARY OF ARGUMENT

This case presents a classic example of a federal regulatory program operating wholly outside the demands of the Constitution and as a result often destroying the historic and productive uses of private property. The facts of this case tell a compelling story of hardship and inequities foisted upon an individual property owner, the Petitioner. The larger picture is of countless individual property owners all across the country in a variety of contexts being singled out to bear the cost of achieving a wetland policy requiring the setting aside of millions of acres of private land as wetland reserves, often without payment of compensation to the property owner.

What makes this case particularly egregious is that the use of the property engaged in by the Petitioner and now forbidden by the Army Corps of Engineers (Army Corps) is an activity that Congress expressly exempted from regulation in the Clean Water Act, Section 404(f). Moreover, the land delineated as wetland by the government has been historically used, since at least the 1930's by the Brace family, for pasture and crop production. The Petitioner purchased the farmland from his father in 1975 with the intention of continuing the historic, productive use of that land and keeping the farming operation within the Brace family. When he purchased the property, the Petitioner was aware that the existing drainage system, which integrated the now-regulated thirty-acre parcel with other portions of the farm, needed upgrading. Moreover, due to the clogged drainage system, the regulated parcel was in poor condition and thus by then only partially utilized for crop production.

So in 1976 and 1977, Petitioner cleared clogged drains and replaced old and broken tiling in order to make the drainage system fully functional for the entire farm. The United States Agricultural Stabilization and Conservation

Service (ASCS) drew up the original plan for the drainage system and Petitioner continued to work closely with that agency for the next eight years, from 1977 to 1985. In 1986 and 1987, the Petitioner continued improvements to the drainage system, cleared the parcel of existing vegetation and prepared it for crop production. In 1987 and 1988, both the Environmental Protection Agency (EPA) and the Army Corps ordered the Petitioner to cease all activity and to allow indigenous vegetation to grow on the parcel, arguing that the activity he was conducting on his property was beyond the scope of "normal farming activity" allowed under Section 404(f) of the Clean Water Act.

Specifically, the Petitioner was told that he can no longer grow crops on the thirty acres which his family has farmed for decades. Nor can he continue to maintain the decades-old drainage system which services the entire 137-acre farm. As a result, the Petitioner's farming operations are jeopardized.

The court below clearly erred when it concluded that the Petitioner's farming activities were outside the scope of Section 404(f). In so ruling, the court below patently violated the language of the provision which on its face exempts "normal farming activity." Applied elsewhere, the ruling below could result in the regulatory shutting down of millions of productive and historic uses of agricultural property. All across the United States there are farmers, just like the Petitioner in this case, who are making reasonable, investment-backed decisions regarding the use of their land in reliance on Section 404(f) which purports to exempt "normal farming activity." Destruction of these investment-backed expectations directly implicates the duty of the government to compensate the property owner. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978).

Therefore, it is clear that the court below did not consider the Fifth Amendment ramifications of its decision which

could potentially require the federal government to compensate thousands of similarly situated farmers across the United States. *See, e.g., Florida Rock Indus., Inc. v. United States,* 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied,* 115 S. Ct. 898 (1995)(government to compensate property owner for the denial of wetlands permit to mine limestone) and *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171 (Fed. Cir. 1994)(government to compensate property owner for the denial of a wetlands permit to develop property).

Accordingly, this Court should grant the Petition requested in this case and reverse the decision of the court below as being inconsistent with the intent of Congress in adopting the Section 404(f) agriculture exemption and with the Fifth Amendment which requires that property owners be compensated for the taking of their property.

## ARGUMENT

### I. THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT — WHETHER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT REQUIRES THAT SECTION 404(f) OF THE CLEAN WATER ACT BE INTERPRETED AND ENFORCED IN A MANNER THAT DOES NOT PROHIBIT NORMAL ACTIVITIES BASIC TO THE BENEFICIAL AND PRODUCTIVE USES OF PROPERTY AS PROTECTED BY THE CONSTITUTION.

The property rights protections of the Fifth Amendment include the rights "to possess, use & dispose" of private

property. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Where government attempts to prohibit normal, well-established uses of private property, without providing compensation to the property owner, it risks running afoul of these important constitutional guarantees. In *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992), this Court held that regulatory prohibitions of such ordinary uses as farming must be considered in the context of the historic use of the property and surrounding area, stating that "the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition. . . ." *See Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). Farming in general is a common and historic use of private property, and is specifically a historic use of the regulated land at issue in this case, and as such, that use cannot be infringed or destroyed by government with impunity. *See Lucas*, 112 S. Ct. 2886 (1992). Nevertheless, the Respondent interpreted its authority to regulate the use of private property under Section 404 of the Clean Water Act in blatant disregard of the property owner's constitutional right to continue the farming operations in place for decades.

In applying a twisted reading of the phrase "normal farming activity," the court below has sanctioned the Petitioner's loss of all right to make reasonable, beneficial, and productive use of his property as guaranteed by the Fifth Amendment.[1] Petitioner cannot utilize the drainage system

[1] It should be further noted that the interpretation by the court below of Section 404(f) makes criminal activity out of the only economically viable use of the Petitioner's property and, likewise, of thousands of other farmers similarly situated. *See* Roger Marzulla, *Presumed Guilty: Wetlands Criminal Prosecutions, in* Farmers, Ranchers and Environmental Law, 39-76 (Roger Clegg ed., 1995). Mr. Brace now faces the possibility of hundreds of thousands of dollars in penalties, which may be assessed upon remand to the district court.

installed by his grandfather which he painstakingly refurbished and maintained over a period of more than ten years and which is necessary for crop production on the parcel and is integrated with the entire farm. Without proper drainage, the property cannot be used for agricultural production — the sole historic use of the property.

As Section 404(f) reflects, Congress never intended to interrupt the nation's agricultural production when it adopted the Clean Water Act. The language of the provision could not be clearer: "normal farming activity" is allowable under the Act.[2] Under this exemption, a farmer should be allowed to continue farming his property regardless of the hydrology, soil characteristics and vegetation of the property and the potential that in fact the land could be designated as "wetland." Clearly Congress recognized the importance of the agricultural industry to our nation's well-being. Farmers are responsible for the production of food and fiber for the citizens of this country. Production agriculture (the output of goods and services by farms and ranches) totaled $188 billion in 1993, approximately three percent of the gross domestic product. Economic Research Serv., U.S. Dep't of Agric., Pub. No. ECIFS-13-1, Economic Indicators of the Farm Sector, National Financial Summary (1993). From farm to table, farm products in 1993 were responsible for sixteen percent of the gross domestic product and twenty-two million jobs, eighteen percent of the workforce. U.S. Census Bureau, Statistical Abstract of the United States, Industries of the Total Food and Fiber System (115th ed. 1995).

Over the life of the wetlands regulatory program, Congress has often reiterated its intent that the Act be construed in a manner that would not prohibit America's farmers from

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[2] The exemptions applicable to the present case, which preclude the necessity of asking permission of the government to conduct enumerated activities, include "normal farming" and the "maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A),(C).

earning a living. [3]

One vital aspect of farm production is proper drainage of agricultural land, which is allowed as part of the agriculture exemption of the Clean Water Act. Drainage and irrigation are an integral part of a long range program to balance production with conservation of resources so that the land is productive for generations to come. The decision of the court below, which disallows drainage of the Petitioner's property, flies in the face of the clear congressional scheme by separating out this inseparable aspect of farming.

In the same way that Congress did not intend that farmers be precluded from engaging in normal agricultural activities, surely the framers of our Constitution did not intend that there be wholesale destruction of beneficial and productive uses of land. When such uses of private property are prohibited, the fundamental principle underlying the protection of property rights is nullified merely to realize some momentary regulatory goal. Regulatory programs that result in the wholesale elimination of private property rights, no matter how laudable, cannot be countenanced. As Justice Marshall observed in the landmark decision of this Court in *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982): "[T]he government does not have unlimited power to redefine property rights."

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[3] For example, Representative Breaux stated that:

> it is important that our farmers, many of whom have never previously been affected by the complex regulatory program under Section 404, be well-informed and be assured that continuing their normal farming practices will not require new burdens or subject them to potential violations of federal law

136 Cong. Rec. S5643, 5648 (daily ed. Apr. 18, 1990) (statement of Rep. Breaux).

## II. THIS COURT MUST ALSO DECIDE WHETHER THE GOVERNMENT MAY UNILATERALLY EXTINGUISH THE REASONABLE INVESTMENT-BACKED EXPECTATIONS OF A WHOLE CLASS OF PROPERTY OWNERS.

This Court has long recognized that frustration of distinct, investment-backed expectations by government regulation is a critical component of the regulatory takings compensation analysis. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978), Justice Brennan stated that "*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" In *Penn Central*, Justice Brennan further upheld the concept of interference with investment-backed expectations as a critical factor in the takings analysis. This focus on the reasonable investment-backed expectations of the property owner has later determined the outcome in several of this Court's leading takings cases.

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), for example, the plaintiff alleged that EPA's public disclosure of confidential material gave away valuable trade secrets. The information had been submitted by Monsanto to EPA in order to register a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). In assessing whether plaintiff had an expectation that this information would be kept secret, the Court wrote that "[a] 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Id.* at 1005-06 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Under this definition, this Court found that between

the years 1972 and 1978, "the Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." *Id.* at 1011. On these grounds, the *Monsanto* Court found a taking.

Government interference with investment-backed expectations also resulted in a taking in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). Plaintiffs there signed a lease to mine uranium on the Navajo Indian reservation and then spent more than $5 million on exploration. This led to the knowledge that a sizable amount of uranium lay in the leased area. United then applied for the necessary permits. Although United met the technical requirements, the United States withheld the permits to mine on the grounds that the Navajo tribe had not approved the mining plan. The permit delay caused the lease to lapse and the Navajos kept all lease bonuses, rents and royalties.

The federal circuit found that the government's new policy of allowing the tribe to veto ratified leases "seriously interfered with United's investment-backed expectations by destroying them." *Id.* at 1437. The court recognized that expectations may be frustrated by future regulations but that:

> The fact that United agreed that the leases would be subject to future regulations does not indicate that United fairly can be said to have anticipated that the Secretary would apply a new policy requiring tribal approval of mining plans to leases entered into almost six years earlier, in reliance on which United had expended some $5 million.

*Id.* at 1436. *See also Yancey v. United States*, 915 F.2d 1534, 1539-40 (Fed. Cir. 1990)(government-mandated quarantine of turkeys interfered with plaintiff's investment-backed expectations to sell the flock out of state).

The federal circuit has also held that destruction of reasonable investment-backed expectations in the context of wetlands regulations can violate the Fifth Amendment. In *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994), landowners designed and began a land reclamation project under the approval of the Army Corps of Engineers. The EPA then modified the plan, which "eliminated the landowners' expectation of land reclamation, causing the property's value to plummet." *Id.* at 632. As a result, the court concluded that a taking had occurred. In another recent case, *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), property owners were awarded compensation for the taking of their property, which became subject to wetlands regulation after they purchased it for development. Assessing the expectations of the property owners, the court pointed out:

> It is important to note that Loveladies purchased the property with the intent to develop it long before these particular state and federal regulatory programs came into effect. Furthermore, the state did not include in its original conditions for development of the property any restrictions on the filling of the 12.5 acres at issue here. The fill restrictions did not arise until long after the development project was undertaken.

*Id.* at 1183.

In the instant case, Petitioner had likewise reasonably relied on the government's explicitly exempting from the Section 404 permitting program "normal farming activities" including "drainage" of his farm land. Because of the clear wording of Section 404(f) and the government's consistent interpretation of that provision and approval of his activities, Brace had no reason to anticipate that the federal government would suddenly render his activities unlawful, thereby wiping out his long-term and costly expenditures. However, not only has the decision of the court below frustrated Petitioner's reasonable investment-backed expectations, applied elsewhere, the decision may potentially destroy the expectations of farmers all across the country. In short, the implications of the decision below are staggering.

And while this Court has often stated that the Fifth Amendment does not bar the government from taking private property rights, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990), surely the framers of our Constitution could not have envisioned that the government would engage with impunity in wholesale destruction of private property rights resulting in the potential payment of millions of dollars as compensation for the takings. Indeed, the Fifth Amendment, unless it is to forever "be relegated to the status of a poor relation" vis-a-vis other constitutionally-protected rights, *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2313 (1994), must at a minimum, require the government to consider the property rights at stake before it adopts a policy involving a sweeping disregard of those rights.

## CONCLUSION

In order to ensure that the Respondent's interpretation of Section 404(f) not be applied in a manner which continues to "redefine" private property rights out of existence, it is important that this regulatory provision be construed in a manner consistent with the Fifth Amendment. Accordingly, these *amici* urge this Court to grant the requested Petition and issue the Writ of *Certiorari*.

Respectfully submitted,

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(4)

No. 94-1669

# In the Supreme Court of the United States

OCTOBER TERM, 1994

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ROBERT BRACE AND ROBERT BRACE FARMS, INC.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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## QUESTIONS PRESENTED

1. Whether petitioners violated the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, by failing to obtain a Section 404 permit before discharging dredged and fill materials to convert a 30-acre wetland area into cropland.

2. If we assume that Section 404(f)(1) of the Clean Water Act exempts petitioners' discharges as "normal farming" activities, 33 U.S.C. 1344(f)(1), whether Section 404(f)(2) excepts those discharges from the exemption because the discharges converted the wetland to "a use to which it was not previously subject." 33 U.S.C. 1344(f)(2).

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a-41a) is reported at 41 F.3d 117. The opinion of the district court (Pet. App. 1a-18a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on November 22, 1994. A petition for rehearing was denied on January 9, 1995. Pet. App. 42a. The petition for a writ of certiorari was filed on April 10, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

The United States sued petitioners for injunctive relief and civil penalties under the Clean Water Act of 1977 (CWA), 33 U.S.C. 1251 *et seq.*, based on their unpermitted discharges of dredged and fill material into a wetland area. The United States District Court for the Western District of Pennsylvania conducted a bench trial and entered judgment for petitioners. Pet. App. 1a-8a. The court of appeals reversed that judgment and remanded the case for determination of an appropriate remedy. *Id.* at 19a-41a.

1. The Clean Water Act generally prohibits the discharge of any pollutant into navigable waters of the United States unless the discharge is authorized by a permit. See CWA § 301(a), 33 U.S.C. 1311(a). The Act broadly defines the "discharge" of "pollutants" to include the addition of dredged or fill material. CWA § 502(6), (12) and (16), 33 U.S.C. 1362(6), (12) and (16). The Act defines "navigable waters" to mean "the waters of the United States." CWA § 502(7), 33 U.S.C. 1362(7).

Section 404 of the Act authorizes the Secretary of the Army to issue permits for discharges of dredged or fill material, 33 U.S.C. 1344(a) and (d). The Army Corps of Engineers and the Environmental Protection Agency (EPA) have issued regulations for administration of the permit program. Those regulations define the term "waters of the United States" to include "wetlands." 33 C.F.R. 328.3(b); 40 C.F.R. 230.3(t). See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-134 (1985) (upholding Corps' regulatory authority over adjacent wetlands); see also *United States* v. *Pozsgai*, 999 F.2d 719, 722 (3d Cir. 1993), cert. denied, 114 S. Ct. 1052 (1994).

Section 404(f)(1) exempts certain activities from the permit program. See 33 U.S.C. 1344(f)(1). Section 404(f)(1)(A) states that a permit generally is not required for the discharge of dredged or fill material "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." 33 U.S.C. 1344(f)(1)(A). Section 404(f)(1)(C) similarly states that a permit is not required for discharges for the purpose of "the maintenance of drainage ditches." 33 U.S.C. 1344(f)(1)(C).

The Corps' regulations governing the administration of the Section 404 program provide guidance with respect to the statutory exceptions. The Corps' regulations state that "normal farming" activities must be part of an "established (i.e., on-going) farming" operation and "in accordance with" the regulatory definitions of the statutory terms. 33 C.F.R. 323.4(a)(1)(ii).[1] The Corps' regulations also state that "maintenance" of drainage ditches includes the "maintenance (but not construction) of drainage

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[1] Those definitions state, for example, that "[p]lowing" means "all forms of primary tillage," but "does not include the redistribution of soil * * * in a manner which changes any area of the waters of the United States to dry land." 33 C.F.R. 323.4(a)(1)(iii)(D). The definitions similarly state that "[m]inor [d]rainage" means "[t]he discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands," but "does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland * * *, or conversion from one wetland use to another (for example, silviculture to farming)." 33 C.F.R. 323.4(a)(1)(iii)(C).

ditches." 33 C.F.R. 323.4(a)(3). The EPA regulations contain similar provisions. See 40 C.F.R. 232.3 (c)(1)(ii)(A) & (B), 232.3(d)(3)(ii), and 232.3 (d)(4).

Even if Section 404(f)(1) exempts a discharge from the permit requirement, Section 404(f)(2) may rescind the exemption. Section 404(f)(2) provides:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. 1344(f)(2). The Corps regulation addressing that "recapture" provision states in relevant part that "[a] conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." 33 C.F.R. 323.4 (c). For example, "a permit will be required for the conversion of a cypress swamp to some other use * * * when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of * * * structures used to effect such conversion." 33 C.F.R. 323.4(c).

2. Petitioners Robert Brace and Robert Brace Farms, Inc., own approximately 600 acres of real property in Erie County, Pennsylvania, including the 30-acre wetland site that is the subject of this suit. Pet. App. 21a. Brace's family owned and used that site as pasture for cows and horses until 1976. *Ibid.* Robert Brace purchased the property in 1975, and he periodically engaged in some brush clearing and

made some drainage improvements. The 30-acre site, however, was not used for pasturing or growing crops from 1977 to 1986. See *id.* at 21a-23a; Gov't C.A. App. A91-A95, A597, A637-A638.

In 1985, Brace began clearing all substantial vegetation from the wetland area. He discharged dredged and fill material into the wetland area by: (1) mulching, churning and levelling the wetland site (Gov't C.A. App. A97-A99, A110-A113, A644); (2) dredging material from a creek bordering the site and spreading the material over the site (*id.* at A103-A108, A644); and (3) excavating and burying several miles of plastic tubing (known as "drainage tile") at the site in an effort to drain the wetland (*id.* at A114-A115, A118, A133-A136, A152-A153, A644-A646, A160, A161). As a result of those levelling, spreading, and tiling activities, Brace was able to begin growing crops at the 30-acre site in 1986 and 1987 (*id.* at A96, A637-A638, A646). See Pet. App. 23a.

The United States Fish and Wildlife Service (FWS) learned of Brace's activities in May 1987 and referred the matter to the Corps and the EPA for enforcement. See Gov't C.A. App. A179, A293-A296, A373-A376. During the next year, the Corps and EPA issued three orders finding that Brace had violated the Clean Water Act by discharging fill material without authorization and ordering Brace both to cease and desist immediately all filling activities at the wetland site and to submit a restoration plan for the site (*id.* at A163, A165, A167). The Pennsylvania Department of Environmental Resources also issued Brace a "Notice of Violation" advising him of the need for a permit to work in wetlands and requesting a plan for restoring the site (*id.* at

A180). Brace did not comply with those orders and continued to prevent regrowth of indigenous plants by mowing the site on a regular basis (*id.* at A147, A624). See Pet. App. 23a-24a.

3. The United States filed a civil suit in October 1990. The complaint alleged that petitioners' activities at the 30-acre wetland site between October 1984 and May 1987 had violated the Clean Water Act's permit requirements. The United States sought restoration of the site, a permanent injunction, and a civil penalty. Shortly before trial, petitioners stipulated that, at the time of the discharge activities in issue, "the approximately thirty-acre site that is the subject of this lawsuit was wetlands as defined at 33 C.F.R. § 328.3(b), and 40 C.F.R. § 232.2(r)." Gov't C.A. App. A40; see Pet. App. 20a, 27a.

The United States established, either by stipulation or at trial, the five elements of a prima facie case for violations of Section 404 of the Clean Water Act: (1) petitioners admitted that they are "persons" within the meaning of the Act; (2) petitioners admitted that the activities at the site were conducted without a permit; (3) petitioners stipulated that the site was a wetland area at the time of the discharges; (4) the district court held that "the site constituted waters of the United States at the time of [petitioners'] activities" (Pet. App. 13a ¶ 7); and (5) the United States demonstrated at trial petitioners' three distinct discharge activities described above. Pet. App. 20a.

The district court nonetheless held that Section 404(f)(1) exempted petitioners' discharges from the permit requirement. The court concluded that petitioners' activities on the wetland constituted "normal farming activities," and "upland soil and water

conservation practices," within the meaning of Section 404(f)(1)(A). Pet. App. 16a. In addition, the court found that Brace's conduct was exempt as "maintenance of the drainage system" under Section 404(f)(1)(C). Pet. App. 17a. The court also concluded that Section 404(f)(2)'s recapture provision was inapplicable because "[t]he land is not being converted to a use to which it was not previously subject, nor has significant impairment to the reach or flow of waters been proven." Pet. App. 16a.

4. The court of appeals reversed, ruling that Brace's discharge activities did not qualify for an exemption from the Clean Water Act's permit requirements. Pet. App. 19a-41a. The court of appeals recognized that Section 404(f)(1) provides an exemption for "normal farming" activities, but the court ruled that the district judge had erred by relying on what was "normal" for farmers in Erie County without reference to "the regulatory construction accorded the statutory term 'normal farming activities' by the agencies charged with the implementation of the statute." Pet. App. 30a.

The court of appeals concluded that Brace's discharge activities were not "part of an 'established (i.e., on-going) farming operation'" and were not "conducted 'in accordance with the [Corps-prescribed] definitions.'" Pet. App. 31a, quoting 33 C.F.R. 323.4(a)(1)(ii). The court explained that, "[u]nder the regulations, a farming operation is *not* 'ongoing' where 'modifications to the hydrological regime are necessary to resume operations.'" Pet. App. 33a. In this case, Brace's own testimony established that the 30-acre wetland site was not used for farming from 1977 to 1986 and that he was able to begin

growing crops at the site only as a result of his levelling, spreading, and tiling activities, which stripped the site of all indigenous plants and drained the wetland. *Id.* at 32a-33a. Moreover, petitioners' admitted activities did not constitute "plowing" and "minor drainage" under the Corps' specific definitions of those terms. *Id.* at 36a-37a.

The court of appeals also held that petitioners had failed to meet their additional burden of proving that their discharge activities did not fall within Section 404(f)(2)'s "recapture" provision. The court explained that the district judge had erred in suggesting that the burden of proving "recapture" was on the United States, Pet. App. 39a, and the court concluded that "Brace's activities fall squarely within the statutory definition of 'recapture,'" *id.* at 40a. The court of appeals remanded the case for determination of the appropriate remedy. *Id.* at 41a.

## ARGUMENT

Petitioners assert that the court of appeals erred in reversing the district court's determination that their conversion of a 30-acre wetland site to cropland, through undisputed levelling, spreading, and drainage activities, was exempt from the permit requirement in Section 404 of the Clean Water Act, 33 U.S.C. 1344. Contrary to petitioners' protestations, the court of appeals' decision is correct. It does not conflict with any decision of this Court or another court of appeals, and it raises no issue warranting this Court's review.

1. Petitioners contend (Pet. 9-17) that they were exempt from the Clean Water Act's permit requirement because they were engaged in "normal farming" activities within the meaning of Section 404(f)

(1). The court of appeals correctly concluded that petitioners' undisputed dredge and fill activities at a conceded wetland site did not qualify as "normal farming" activities. Under the Corps' regulations, a Section 404(f)(1) exemption is *not* available if the activities "bring an area into farming * * * use" or if "modifications to the hydrological regime are necessary to resume [farming] operations." 33 C.F.R. 323.4(a)(1)(ii). Furthermore, qualifying activities must be "in accordance with [the] definitions in § 323.4(a)(1)(iii)." 33 C.F.R. 323.4(a)(1)(ii). Petitioners' levelling, spreading, and drainage activities at the site did not meet any—much less all—of the regulatory conditions for a Section 404(f)(1) exemption.

First, petitioners were disqualified from the Section 404(f)(1) exemption because they engaged in "[a]ctivities which bring an area into farming * * * use." 33 C.F.R. 323.4(a)(1)(ii). The record shows that the Brace family used portions of its farm for growing crops, but the 30-acre wetland site at issue here was not suitable for that purpose precisely because of its wetland characteristics. Brace admitted below that no crops had been grown on the 30-acre site until the fall of 1986—after Brace had stripped the wetland of its vegetation, spread dredged material, and drained the site. See Pet. App. 32a-33a; Gov't C.A. App. A96, A647-A638, A646. The 30-acre site was used for pasturing prior to 1977, but the only activities that Brace conducted at the site between 1977 and 1986 were levelling, spreading, and drainage tiling. By Brace's own admission, he undertook those activities to convert a wetland that was *not* suitable for row cropping into a site on which crops could be grown. Pet. App. 33a.

Second, even if petitioners could reasonably contend that the 30-acre wetland parcel was already in "farming" use at the time of Brace's activities (Pet. 12), petitioners would still not qualify for the Section 404(f)(1) exemption. Although petitioners had at one time used the site for pasturing, they had ceased using the site for that purpose by 1977. They then made "modifications to the hydrological regime" of the site that were "necessary to resume [farming] operations." 33 C.F.R. 323.4(a)(1)(ii). Brace admitted at trial that drainage tubing was installed to drain the site "[s]o we could raise crops on it, productive crops." Gov't C.A. App. A646; see also Pet. App. 6a-7a, 39a; Gov't C.A. App. A114-A115, A118, A133-A136, A152-A153, A644-A646. Petitioners' activities of modifying the wetland's hydrological regime to allow row cropping disqualified petitioners from the Section 404(f)(1) exemption.

Third, petitioners failed to show that their activities were "in accordance with [the] definitions in § 323.4(a)(1)(iii)." 33 C.F.R. 323.4(a)(1)(ii). To the contrary, the Corps regulations specifically identify the activities at issue here as *not* qualifying for a Section 404(f)(1) exemption. The regulations exclude petitioners' installation of drainage tubing from the definition of "minor drainage" because it entailed (1) "the construction of any * * * structure which drains or otherwise significantly modifies a * * * wetland or aquatic area constituting waters of the United States"; and (2) "drainage associated with the immediate or gradual conversion of a wetland to a non-wetland * * *, or conversion from one wetland use to another (for example, silviculture to farming)." 33 C.F.R. 323.4(a)(1)(iii)(C)(2). Similarly, the regulations exclude petitioners' devegeta-

tion, spreading, and levelling activities from the definition of "plowing" because they consisted of (1) "the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land"; and (2) "the redistribution of surface materials by blading, grading, or other means to fill in wetland areas." 33 C.F.R. 323.4(a)(1)(iii)(D).[2]

2. As petitioners apparently recognize, even if they could establish that they qualified for a Section 404(f)(1) exemption from the Clean Water Act's permit requirements, they would additionally have to demonstrate that Section 404(f)(2)'s "recapture" provision does not override that exemption and reimpose the permitting requirements on their activities. See Pet. App. 38a. Petitioners argue (Pet. 17-22) that their activities are not subject to "recapture" because the Corps' regulation implementing Section 404(f)(2)—33 C.F.R. 323.4—provides an overbroad and improper construction of the statutory terms. That challenge, however, is not properly before this Court for review.

Petitioners did not challenge the validity of the Corps' regulation in the courts below, and neither

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[2] Petitioners assert that their activities fall within the regulatory definition of "normal farming" activities because "the regulations do not purport to be all inclusive; they are merely examples." Pet. 14. Although the regulations provide examples of "normal farming activities," they also include descriptions of categories of activities that do not fall within the exemption. The court of appeals correctly held that petitioners' activities were among those identified as *not* within the "normal farming activities" exemption. Contrary to petitioners' suggestion, the Corps' regulations do not authorize, as "normal farming activities," all activities conducted on farms.

court addressed that issue. This Court does not ordinarily consider "issues neither raised before nor considered by the Court of Appeals," *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), and petitioners provide no reason to depart from that practice here. Indeed, it appears that the court of appeals did not place essential reliance on the Corps' regulation. The court stated that "Brace's activities fall squarely within the *statutory* definition of 'recapture.' " Pet. App. 40a (emphasis added).

The court of appeals correctly concluded that petitioners' activities satisfy the two-part statutory test for recapture. Section 404(f)(2) imposes the Clean Water Act's permit requirements on any discharges of dredged or fill material that are

> [1] incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject,
>
> [2] where the flow of circulation of navigable waters may be impaired or the reach of such waters be reduced * * *.

33 U.S.C. 1344(f)(2). Petitioners' conceded purpose in installing several miles of drainage tubing at the site was to drain the site "[s]o we could raise crops on it" (Gov't C.A. App. A646), a use to which the 30-acre wetland site "was not previously subject." And the government produced uncontradicted expert testimony that petitioners' activities impaired the flow, circulation, and reach of "navigable waters," which the Clean Water Act defines as "waters of the United States," CWA § 502(7), 33 U.S.C. 1362(7), and which include the wetlands involved in this case, Pet. App. 13a. See Gov't C.A. App. A499-A504, A556-A557. Hence, the court of appeals was correct

in concluding that petitioners' activities were "recaptured." Pet. App. 39a-40a. That largely factual issue does not warrant further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-1669

# In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT BRACE AND ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation, *Petitioners,*

*v.*

UNITED STATES OF AMERICA, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION, NEW YORK FARM BUREAU, INC., AND PENNSYLVANIA FARM BUREAU IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

*Amici* will address the following questions:

1. Whether the court of appeals' narrow construction of the "normal farming" exemption set out in section 404(f) of the Clean Water Act, and its expansive construction of that section's "recapture" provision, fail to comport with the statute or its implementing regulations.

2. Whether the court of appeals' misconstruction of section 404(f) imposes intolerable burdens on farmers that Congress did not intend.

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# In the
# Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-1669

ROBERT BRACE AND ROBERT BRACE FARMS, INC., a Pennsylvania corporation, *Petitioners,*

*v.*

UNITED STATES OF AMERICA, *Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION, NEW YORK FARM BUREAU, INC., AND PENNSYLVANIA FARM BUREAU IN SUPPORT OF PETITIONERS

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### INTEREST OF THE AMICI CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm association organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and

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* Consents to the filing of this brief are on file with the Clerk.

Puerto Rico representing more than 4.4 million member families. Amici New York and Pennsylvania Farm Bureaus are members of AFBF, representing the interests of farmers and ranchers in their respective states.

AFBF and the state Farm Bureau amici have a direct interest in the outcome of this case. Their farmer and rancher members own or lease significant amounts of property, on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. Amici's members' use of their land is severely restricted by the court of appeals' crabbed interpretation of section 404(f) of the Clean Water Act—an interpretation that eviscerates the Congressional exemption of normal farming activities from the burdens of the CWA's permit program. The Third Circuit's construction of the statute's exemption and recapture provisions expands the reach of the CWA far beyond what Congress intended, at best creating uncertainties about permissible conduct and at worst exposing farmers pursuing routine farming activities to substantial penalties.

Although the court of appeals' decision will have nationwide impact, amicus Pennsylvania Farm Bureau, which represents over 26,600 families in the Commonwealth, notes that it is of special and immediate concern to the approximately 5,800 farms located in northwestern Pennsylvania. The topography and quality of the land farmed by petitioner Brace is typical of that region, where poor drainage that diminishes crop productivity and yield is the norm. Similar conditions exist in portions of New York State, where amicus New York Farm Bureau represents over 25,000 member families. In the southwestern portion of Chautauqua County, New York, alone, hundreds of farms would be directly impacted by

the court of appeals' decision, as would thousands of farms statewide. The Third Circuit's misconstruction of the CWA harshly limits the ability of Pennsylvania and New York farmers to use historically proven soil management practices, thereby jeopardizing their ability to meet needed levels of feed crop production and casting doubt on the economic viability of both the farms themselves and the families who operate them.

Amici urge this Court to grant certiorari to correct the court of appeals' unjustified narrowing of a legislative exemption expressly intended to shield farmers and ranchers from excessive entanglement with bureaucratic agencies. We believe that amici's experiences with the operation of the statute and regulations at issue will be helpful to this Court in its disposition of this case.

## SUMMARY OF ARGUMENT

1. In response to widespread concern that judicial construction of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, had expanded the reach of that statute into the everyday operations of the Nation's farmers and ranchers, Congress amended the Act to exempt "normal farming, silviculture, and ranching activities" from the general requirement that a permit be obtained to discharge dredged or fill material into the navigable waters of the United States. 33 U.S.C. § 1344(f)(1)(A). The language and structure of the amendment, as well as of its implementing regulations, indicate an intention to create a broad exemption. The Third Circuit's narrow construction of the exemption and expansion of the recapture provisions of CWA section 404(f) does not comport with the relevant statutory or regulatory language, the legislative history, or practical realities.

Congress apparently intended that farmers run the gauntlet of the permitting process when incorporating new tracts of *non-farm* wetlands into the farming process. However, Congress most certainly did not intend that federal regulators would require a permit every time a farmer wishes to change exactly which part of his existing farmland is used as pasture and which part is used for growing row crops. The court of appeals' misconstruction of section 404(f) ignores the natural reading of the statutory text, eviscerates the careful balance struck by Congress between protecting wetlands and sparing farmers the burdens of a bewildering regulatory process, and extends the reach of the CWA far beyond that envisioned by Congress.

2. By incorporating an exemption in the 1977 amendments to the CWA, Congress endeavored to simplify the regulatory burdens on farmers by keeping the Army Corps of Engineers ("Corps") out of routine decisions about the most productive and efficient uses of their land. So long as farmers engaged in normal preparatory, productive, and maintenance activities, they were to be free from the regulatory process. The actions of overzealous bureaucrats have undermined the implementation of Congress' plan, imposing intolerable demands on hard-working American farmers.

3. The CWA's statutory and regulatory scheme imposes restrictions on the beneficial use of land that constitute takings for which just compensation must be paid under the Fifth Amendment. The court of appeals' decision, by narrowing section 404(f)'s normal farming exemption, will lead to an increase in regulatory takings and hence threatens to impose a significant additional burden on the public fisc that Congress did not contemplate. This serious, yet unforeseen, constitutional

implication offers further evidence that the court of appeals erroneously construed the scope of section 404(f) in this case and presents a compelling reason for this Court to grant certiorari.

## ARGUMENT

### I. THE THIRD CIRCUIT'S CONSTRUCTION OF SECTION 404(f) DOES NOT COMPORT WITH THE TEXT OF THE STATUTE OR ITS IMPLEMENTING REGULATIONS

This case squarely presents an important issue of federal law with significant practical consequences. In 1977, Congress made a deliberate policy choice to exempt the ordinary activities of farmers and ranchers from the costly and burdensome requirements of the Clean Water Act section 404 permit scheme. Now, the court of appeals in this case has seriously narrowed the scope of the exemption for "normal farming * * * activities" while simultaneously expanding the reach of the statute's so-called "recapture" provision. In so doing, it has extended the scope of the permit requirement far beyond that intended by Congress.

This overreaching has significant adverse consequences for all American farmers. It interrupts long-established farming practices, adding a new layer of regulatory costs and compliance requirements. It prevents farmers from enjoying the full entitlements of property ownership. And, ironically, it spawns precisely the regulatory nightmares from which Congress intended to protect farmers when it amended the CWA in 1977. These results are not what Congress had in mind, and this Court should now intervene to reinstate the intended breadth of the normal farming exemption.

### A. Congress Specifically Amended Section 404 To Exempt Ordinary Farming Activities From The Burdensome CWA Permit Scheme

When water collects "at a frequency and duration sufficient to support * * * a prevalence of vegetation typically adapted for life in saturated soil conditions," it may be classified as "wetlands," even if the water sits on private property. 33 C.F.R. § 328.3(b) (1994). However, controlling surface and subsurface water to ensure a sufficient though not overly abundant supply is critical to successful farming. Thus, it is not surprising that the wetlands protection program enacted in section 404 of the Clean Water Act of 1972 engendered considerable controversy between the government and the agricultural community when a district court ruled that the jurisdiction of the Act extended to waters far beyond "the traditional tests of navigability" and could reach ordinary farmland. See *Natural Resources Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

The expansive reach of the Act threatened to impose a permit requirement on enormous numbers of farmers whose land occasionally contained standing water. Section 404 became "a symbol to many Americans of how a well-intentioned legislative initiative can turn into a quagmire of disruption, frustration, and bureaucratic entanglement for the ranchers, farmers, foresters, and average citizens of this country." 4 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act* ("*Legislative History*") 902 (1978) (statement of Sen. Bentsen). As the chairman of the Senate Committee on Environment and Public Works observed, the complaints

of farmers and ranchers evinced "widespread concern that many activities that are normally considered routine would be made extremely difficult because of the complex regulatory procedures." *Id.* at 897 (statement of Sen. Randolph).

These concerns led in 1977 to amendments to the Act that provided "for the first time statutory recognition that normal farming, ranching, and silviculture activities do not belong in this permit program." 3 *Legislative History* at 351 (statement of Rep. Hammerschmidt). Congress provided that no permit is required for "the discharge of dredged or fill material" either "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting * * * or upland soil and water conservation practices," or "for the purpose of construction or maintenance of * * * irrigation ditches, or the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A), (C). On the other hand, a "recapture" provision stipulated that a permit was required for discharges of dredged or fill material "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject." *Id.* § 1344(f)(2).

These amendments, as the Seventh Circuit has observed, created "a delicate balance of exceptions that protected wetlands while permitting routine activities to go on unimpeded." *United States* v. *Huebner*, 752 F.2d 1235, 1241 (7th Cir.), cert. denied, 474 U.S. 817 (1985). Congress thus made a deliberate policy choice that "[t]he upland farming, forestry and normal development activity carried out primarily by individuals and as a part of a family business or family farming activity

need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters." Senate Report No. 370, quoted in 4 *Legislative History* at 644. As Senator Muskie, one of the principal Senate sponsors, explained, "[t]he drainages exemption is very clearly intended to put to rest, *once and for all*, the fears that permits are required for draining poorly drained farm or forest land of which millions of acres exist. No permits are required for such drainages." *Id.* at 1042 (emphasis added). In this case, the court of appeals has required a permit for *precisely* the "draining [of] poorly drained farm[land]" that Senator Muskie explained was to be exempt.

### B. Application Of The Normal Farming Exemption Requires A Contextual Analysis Of The Total Activities Of A Farming Operation

The court of appeals, rubber-stamping the interpretation of overzealous regulators, construed the statutory exemption and its implementing regulations very narrowly. It ruled that a farmer who converted to crop-bearing use a wetland part of his farm that had long been used as pasture is not entitled to the exemption for "normal farming * * * activity." To reach this surprising result, the court had to subdivide the farmer's parcel and operations, focussing on the change in use of the affected wetland pasture rather than on the continuing agricultural use of the farm as a whole.

Other courts, in contrast, have undertaken a contextual review of the total activities of a farming operation to determine whether the exemption for "normal farming * * * activity" is applicable. See *e.g.*, *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 926 (5th

Cir. 1983); *United States* v. *Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166, 1175 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

This contextual approach best reflects the language chosen by Congress, which broadly exempts "normal farming, silviculture, and ranching activities." 33 U.S.C. § 1344(f)(1)(A). It is consistent, moreover, with regulations amplifying the activities that are exempt from the permit requirement, which do not narrow the exemption but rather mirror the breadth of the statutory text. See 33 C.F.R. § 323.4(a)(1)(i) (exempting "[n]ormal farming, silviculture and ranching activities"); *id.* § 323.4(a)(1)(ii) (the exemption reaches "established (i.e., on-going) farming, silviculture, or ranching operation[s]" and excludes "[a]ctivities which bring an area into farming, silviculture, or ranching use"); *id.* § 323.4(a)(1)(iii)(C)(2) (noting that "minor drainage" does not include drainage associated with the conversion from one wetland use to another and giving as an example conversion from "silviculture to farming"). Neither the statutory nor the regulatory language gives any indication that there are subclasses of a farming operation to which courts should look in delineating the scope of the exemption.

An examination of the examples of normal farming activities enumerated in section 404(f) lends further support to the view that Congress did not intend courts applying the exemption to manufacture artificial distinctions in land usage (such as between pasturing and growing row crops) within the same integrated farming operation. The listed activities include *land preparation* (plowing, seeding), *production* (cultivating, harvesting),

and *maintenance* (drainage and conservation). 33 U.S.C. § 1344(f)(1)(A). Contrary to the Third Circuit's holding, there is absolutely no indication that Congress regarded the precise nature of a farmer's actions within this wide range of conduct as determinative of the exemption's applicability.

Congress understood the frequency with which farmers can (and often must) diversify their operations to achieve maximum output and efficiency. For example, it is common—and indeed very efficient—to combine pasturing with raising row crops that produce feed for the farm's livestock. It also is common for farmers to alter the mix of planting and pasturing as their needs develop, as soil fertility and nutrient levels change as a consequence of current and past use, as markets evolve, and as personal resources expand or contract.[1]

Planting and pasturing—the two activities for which petitioner Brace used the land in issue—are simply subsets of the myriad activities that comprise "normal farming," and they often occur in tandem or in succession on the same farm. Acknowledging this reality, the statute and regulations give farmers flexibility to operate within the broad categories of activities (farming, silviculture, and ranching) to which the section 404

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[1] The transition from one farming use to another (for example, from pasturing to growing crops) often occurs over a period of years. Preparatory activities, which may include draining and plowing, still constitute normal farming activities and indicate that the area in transition has neither "been converted to another [non-farming] use" nor "lain idle" so as to deprive a farmer of the exemption. See 33 C.F.R. § 323.4(a)(1)(ii).

exemption applies, without worrying that the choice between one sort of farming activity and another on a given piece of land may result in a CWA violation. The Third Circuit's ruling that it is the *particular* existing use of a portion of a farm that counts in determining if the normal farming exemption applies, not the fact that the land is *part of a continuing farming operation*, destroys this very necessary flexibility and for practical purposes destroys the exemption.

The Third Circuit also wrongly construed the recapture provision of section 404(f) to extend the reach of the CWA into normal farming activities that Congress intended to leave alone.[2] That provision requires permitting for activity that "bring[s] an area of the navigable waters into a use to which it was not previously subject." 33 U S.C. § 1344(f)(2). The statute provides no further elaboration on the meaning of "use," and the conflicting provisions of the implementing regulations simply confuse matters.

On the one hand, the regulations appear to adopt a broad and flexible approach to farming "uses" and "activities" by specifying that "a permit will be required for the conversion of a cypress swamp to some other use *or the conversion of a wetland from silvicultural to agricultural use*." 33 C.F.R. § 323.4(c) (emphasis added). This provision implies that a conversion from one agricultural use to another—for example, from

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[2] As Petitioner notes, only one other court of appeals has applied the recapture provision to previously farmed land being converted from a wetland farming use to a non-wetland farming use. *United States* v. *Akers*, 785 F.2d 814, 820 (9th Cir.), cert. denied, 479 U.S. 828 (1986).

pasturing to growing row crops—would avoid the recapture provision. On the other hand, the regulation also states categorically that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." *Ibid.*

This latter provision lacks textual or structural support in the CWA, is inconsistent with related regulatory provisions, and, more importantly, conflicts with the intent of Congress. See *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977) ("The question * * * is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations"). Every indication in the statute and regulations, save this one, points to "farming, silviculture, or ranching"—not to "wetlands or non-wetlands"—as the relevant frames of reference for the application of the recapture provision.

Moreover, the legislative history makes clear that Congress did not mean to interfere with the integrated operations of family farms by requiring a permit every time a farmer reconfigures the mix between pasturing and row crops. Congress, as Senator Muskie pointed out, well understood that "draining poorly drained farm[land]" would affect a substantial hydrological alteration to "millions of acres" nationwide. 4 *Legislative History* at 1042. Yet, as the Senator stated, the 1977 amendments established "once and for all" that no permits are required for such activities. *Ibid.* Accordingly, the Third Circuit's contrary ruling notwithstanding, the recapture provision of section 404(f)(2) does not remove active and ongoing farming operations from within the ambit of the normal farming exemption

merely because there occurs a change from one farming use to another.

## II. THE THIRD CIRCUIT'S MISCONSTRUCTION OF SECTION 404(f) IMPOSES INTOLERABLE BURDENS ON FARMERS

The court of appeals' construction of section 404(f) to require farmers to obtain a permit to convert wetland pasture into crop-bearing fields imposes significant financial and administrative burdens: loss of time completing bureaucratic paperwork, legal fees, delay and uncertainty, potential fines, and loss of productive land—all costs that will either make farming less profitable and thus less desirable as a livelihood and investment, or will drive up the prices charged to consumers for food and other basic necessities. The administrative nightmare associated with the CWA's permit scheme often deters farmers from even applying for a permit and discourages all but the most determined from challenging a permit denial in the court system.

Congress envisaged no such consequences when it amended the CWA. The legislative history is replete with statements showing Congress intended that the exemption scheme would give farmers real protection. As of 1977, section 404 "ha[d] become synonymous with Federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism." 4 *Legislative History* at 903 (statement of Sen. Bentsen). Congress undertook to amend the CWA to reflect "the fact that we never intended under Section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, [and] people involved in forestry." *Id.* at 924 (statement of Sen. Domenici). The resulting exemption of normal farming activities from the permit

requirement, Congress hoped, would "greatly simplify the administrative process and reduce the potential redtape burden." *Id.* at 897 (statement of Sen. Randolph).

Implementation of the exemption has not proceeded as Congress intended, as this case perfectly illustrates. As the Corps has put a stranglehold on what heretofore have been regarded as ordinary farming activities, farmers have been left "angry, afraid, confused and amazed because of the things that government is doing to them." Grant, *Don't Tread on Me*, Beef Today, April 1994, at 20.

To begin with, the Corps' inefficiency in processing permit applications is legendary. A February 1994 study found that in 93 percent of the cases the Corps took far longer than the 60 days allowed to evaluate individual permit applications—indeed, took on average *373 days*. In large part because of these delays and permit-related expenses, over half the applications submitted between 1988 and 1993 were withdrawn. In one particularly stunning example, an application involving just 26 square feet of wetland was withdrawn after 450 days without a disposition. The study concluded that "those who criticize the 404 program for excessive delays in the permitting process are not just crying wolf; it takes the average applicant with a wetlands project a long time to get a permit decision." Albrecht & Goode, *Wetland Regulation in the Real World*, Land Rights Letter, July/August 1994, at 13.

Other horror stories about the Corps' excesses abound:

- A California family purchased property to plant grapes for their winery. To help pay property taxes,

they planted hay on the remaining acres of their parcel. Some of the property was wetland. An attorney advised them that they were exempt from the CWA permit requirement because their land had been used for growing hay since the 1930s and more recently for grazing cattle. Aerial photographs and an affidavit from the farmer who had planted the field for over 40 years were insufficient to deter the Corps, which continued to insist that the family had violated the CWA. Letter from Edward R. Bunting to Rep. Lynn Woolsey, *reprinted in* Land Rights Letter, July/August 1994, at 5.

- In the Dakotas and Minnesota the tightening grip of federal regulators has caused farmers to stop draining the "potholes" that dot farms in the region. Now known as "farmed wetlands," these areas no longer can be altered to maximize the utility of the land, even though they tend to be dry in many years. Gullickson, *The War of the Wetlands*, The Farmer/Dakota Farmer, December 1994, at 5.

- Farmers in the Upper Midwest "have found that government red tape is rampant in appealing wetland designations," and are still more stunned by the steep penalties for noncompliance with regulations, even for good-faith violations. *Ibid.*

- Brian Odden, a South Dakota farmer, learned that something as minor as plowing a furrow across one of his fields could cost thousands of dollars in penalties through reduced federal farm payments. Mr. Odden believed that he was merely turning under weeds that accumulated after heavy rains in 1993, but federal wetlands regulators cited him because the furrow allegedly allowed water to drain

from a nearby wetland. Walker, *Wetlands Regulations Often Confuse, Anger Many Farmers*, Sioux Falls Argus Leader, August 4, 1994, at A1.

- State authorities designated 75% of John and Josephine Bronczyk's 160-acre Minnesota farm as a "public water wetland." This designation imperiled their property rights, limiting their use of their land and giving the public, including hunters, a right to walk within 200 yards of their home. *Property Rights: Public Access to Wetland Prompts Lawsuit*, 4 Greenwire 5 (December 20, 1994).

These examples—and we could multiply them hundreds of times over—demonstrate that current interpretation and administration of the section 404 exemption, permit, and review processes have not fulfilled Congress' aim of minimizing the interference of federal regulators in the routine decisions of family farmers. They provide a glimpse into the havoc wreaked by bureaucrats and acquiesced in by the court of appeals in this case. These are not stories about individuals and corporations indiscriminately filling in wetlands, or about farmers seeking to incorporate new tracts of non-farm wetlands into the agricultural process. In those situations, Congress meant for the permitting process to apply. Rather, these vignettes simply detail the plight of hard-working American farmers trying to work their existing farm operations as efficiently as they can. Congress cannot have intended that such routine farming be swept into the labyrinth of CWA permitting.

## III. THE THIRD CIRCUIT'S EVISCERATION OF THE NORMAL FARMING EXEMPTION HAS SERIOUS CONSTITUTIONAL TAKINGS IMPLICATIONS

The court of appeals' cramped construction of the normal farming exemption threatens wholesale takings of farmland for which just compensation must be paid under the Fifth Amendment of the Constitution. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985) (noting that where the Corps "denie[s] respondent a permit to fill its property, respondent may well have a ripe claim that a taking has occurred"); Clark, *Wetlands: Compensation for "Taking" by Denial of the Section 404 Permit*, 29 Idaho L. Rev. 41 (1992/1993); Klock & Cook, *The Condemning of America: Regulatory "Takings" and the Purchase by the United States of America's Wetlands*, 18 Seton H.L. Rev. 330 (1988); Note, *It's Not Easy Being Green: The Judicial View of Government Takings of Private Wetlands*, 2 Fordham Envtl. L. Rev. 155 (1991).

The harsh economic impact of not being able to work sections of one's farm hardly needs elaboration, particularly in the context of a long-established and ongoing farming operation like Mr. Brace's, where significant investment-backed expectations are frustrated. See *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124, 127 (1978). And certainly most farmers had no reason to expect, when they began farming their land, that the government later would tell them that they could not convert a pasture into a field of row crops. See *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992) (observing that farmers'

reasonable expectations have "a rich tradition of protection at common law").

Given the potential for a plethora of Fifth Amendment takings claims by farmers denied the beneficial use of their property for something as routine as converting a pasture into a field of row crops, it is appropriate for this Court strictly to scrutinize judicial and regulatory interpretations of the exemption and recapture provisions of CWA section 404(f). See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988) (narrowing agency's construction of statute that gives rise to "serious constitutional concerns"); *Bell Atlantic Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (construing statute to defeat administrative order that would give rise to takings). As we have demonstrated, the Third Circuit's ruling cannot survive such scrutiny. We urge this Court to grant certiorari to correct the court of appeals' error and to restore to the normal farming exemption the broad scope originally intended by Congress.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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